REPORT OF THE COMMISSION ON SYSTEMIC RACISM IN THE ONTARIO CRIMINAL JUSTICE SYSTEM

A COMMUNITY SUMMARY

December 1995

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Commission on Systemic Racism in the Ontario Criminal Justice System

Commissioners: Margaret Gittens (Co-Chair), David Cole(Co-Chair), Toni Williams, Sri-Guggan Sri-Skanda-Rajah, Moy Tam, Ed Ratushny.

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Summary prepared by Greg Ioannou
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COMMISSION ON SYSTEMIC RACISM IN THE ONTARIO CRIMINAL JUSTICE SYSTEM

COMMISSION SUR LE RACISME SYSTÉMIQUE DANS LE SYSTÈME DE JUSTICE PÉNALE EN ONTARIO

Margaret Gittens
Co-Chair
Coprésidente

David Cole
Co-Chair
Coprésident

Commissioners
Commissaires
• Toni Williams
• Moy Tam
• Ed Ratushny
• Sri-Guggan Sri-Skanda-Rajah

December 19, 1995

The Honourable H.N.R. Jackman
Lieutenant Governor of Ontario
Suite 131
Main Legislative Building
Queen's Park
M7A 1A1

Your Excellency:

Pursuant to our appointment by Order in Council 2909/92 dated October 1992, we are pleased to submit to you our Final Report on Systemic Racism in the Ontario Criminal Justice System.

The Commission appreciates the time, energy and hard work contributed by hundreds of people across the province, as well as the contribution of people nationally and internationally.

Yours very truly,

David P. Cole
Co-Chair

Margaret Gittens
Co-Chair

Moy Tam
Commissioner

Toni Williams
Commissioner

Ed Ratushny
Commissioner

Sri-Guggan Sri-Skanda-Rajah
Commissioner

180 Dundas St. W., 22nd floor, Toronto ON M5G 1Z8
Tel.: (416) 327-6800 Fax: (416) 327-6798

180, rue Dundas ouest, 22e étage, Toronto ON M5G 1Z8
Tél.: (416) 327-6800 Téléc.: (416) 327-6798

Toll free: 1-800-463-8803 Sans frais: 1-800-463-8803

Acknowledgements

The final report of the Commission reflects the contributions of hundreds of people across the Province of Ontario. Our work was invaluably enhanced by the contributions of formal presenters, participants in focus groups and other community meetings, and many others who took the time to write or telephone the Commission throughout the life of our mandate. We also express our appreciation for the formal and informal co-operation we received from officials in several government ministries and other organizations, including the police and judiciary. We are grateful for the assistance of academics and consultants who showed keen interest in our work, and willingly offered advice and numerous suggestions.

We wish to acknowledge and thank all our staff for their dedication and commitment, often against the backdrop of extremely limited time frames. Commissioner Toni Williams deserves tremendous credit for agreeing to accept the task of writing the Report. Her insight, analysis and creative conceptualization of this multifaceted mandate deserves recognition. We must also recognize the invaluable contribution of our Executive Coordinator, Valerie Holder, who in a quiet unassuming way capably managed multiple assignments, solved technical problems, kept track of research papers and documents and mastered new challenges as they arose, all in good humour.

We express thanks to the youth, women and men behind bars who spoke to us in less than elegant circumstances and shared their experiences, knowledge, insight and suggestions with us. We thank the superintendents, correctional officers and staff of federal and provincial penal institutions for their co-operation during visits to these facilities and to other requests that we made.

Our work was enhanced by the contributions of individuals, activists and people from diverse communities and we thank them. We also express our appreciation for the co-operation we received from the Ministers and staff of the three related Ministries of Attorney General, Solicitor General and Corrections, and Community and Social Services. We also acknowledge the contributions of Chiefs of police and members of Police Associations.

Finally, to all those who related their experiences time and time again because they had a hope and vision of a more just and equal society, we hope this report begins that process of change.

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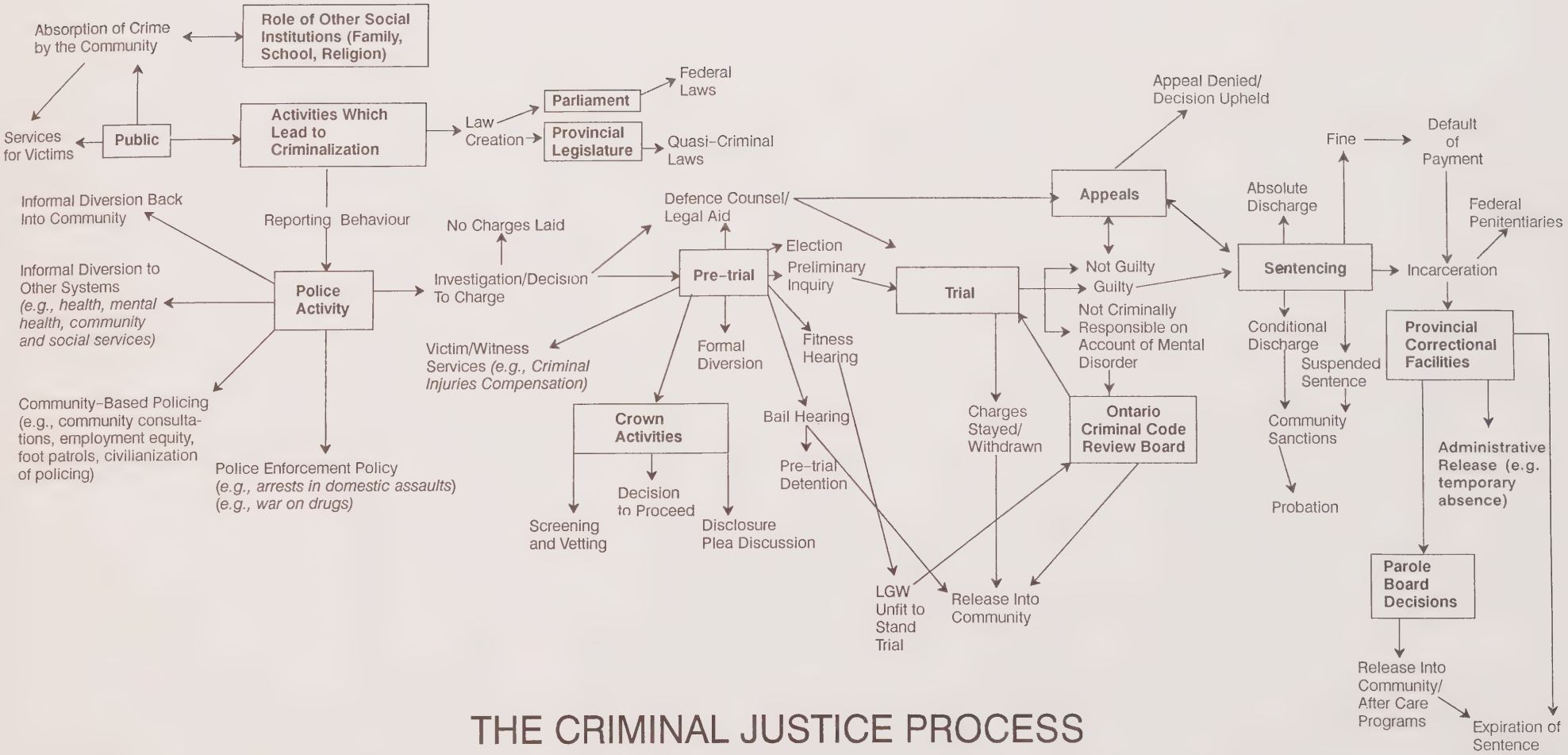

THE CRIMINAL JUSTICE PROCESS

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1

Introduction

Over the past two decades, a lack of confidence in the Ontario criminal justice system has been articulated particularly strongly by members of black communities. Fears have been aroused by several police killings and woundings of black persons since 1978, and sustained by the apparent inability of the system to examine how far racism contributed to these tragedies. A sense of injustice has been intensified by lack of any systemic response to repeated experiences of unpredictable and humiliating encounters with the police. Feelings of exclusion have been reinforced by under-representation of black and other racial minority communities among justice officials. Appointment of a commission of inquiry was recommended by Stephen Lewis in his June 1992 *Report to the Premier of Ontario*, which was a response to civil disturbances in Metropolitan Toronto during May 1992.

The Commission on Systemic Racism in the Ontario Criminal Justice System was established in October 1992 to inquire into and make recommendations about the extent to which criminal justice practices, procedures and policies reflect systemic racism. Six Commissioners from diverse backgrounds were appointed. The Terms of Reference direct the Commission to investigate: the exercise of discretion at important decision-making points, community policing policies and their implementation, systemic responses to alleged criminal conduct by justice officials in relation to racial minority victims, preventing systemic racism through employment practices, policy-making and participation of racial minorities in reform processes, and access to justice services by racial minorities.

As directed by the Terms of Reference we recognize that "throughout society and its institutions patterns and practices develop which, although they may not be intended to disadvantage any group, can have the effect of disadvantaging or permitting discrimination against some segments of society." In so far as such patterns and practices cause racial minority people to experience worse treatment than white people a system may be said to reflect systemic racism. Thus the Commission's task involved the identification of such patterns and practices and the development of recommendations to eliminate them.

Equality is a fundamental right in Canada, guaranteed by the *Canadian Charter of Rights and Freedoms* and protected by federal and provincial human rights codes. The right to equality places two key demands on the criminal justice system. First, it requires that policies, procedures and practices neither reflect nor perpetuate bias against members of groups that "have experienced arbitrary exclusions or burdens based not on their actual individual capacities, but on stereotypical characteristics ascribed to them because they are attributed to the group of which those individuals are

members."

Second, equality requires the criminal justice system to adapt to diversity within the community it serves. A system that provides only uniform treatment, in effect, treats people unequally by ignoring the needs of those who do not fit into its mould.

A system that claims equality as a fundamental value lacks credibility if the public is not convinced that the claim is true . Identifying and responding to such perceptions should therefore be among the highest priorities of the criminal justice system.

We spoke with representatives of every aspect of the criminal justice system and individuals and community organizations active in relation to justice issues. We held focus groups and structured interviews on specific areas of concern with policy-makers, lawyers, justices of the peace, police officers, members of the private security industry, interpreters, community members, prisoners and correctional staff.

We also conducted public hearings and invited submissions from across the province. These consultations were supplemented and enhanced by large-scale surveys of crown attorneys, defence counsel and judges, and smaller surveys of other representatives of the justice system. Residents of Metropolitan Toronto, Ontario's largest and most diverse city, were also surveyed. The Commission also conducted some of the first empirical research in Canada to determine whether the criminal justice system produced differential results in its treatment of white and racial minority people.

This Report presents our findings and recommendations.

2

Racism in Justice: Perceptions

Do Ontario residents think there is racism in the criminal justice system?

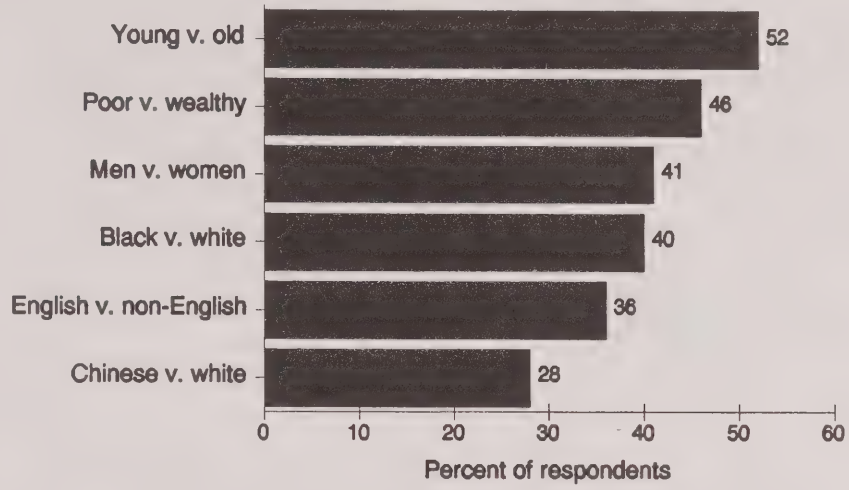
To answer this question, we asked people inside and outside the criminal justice system about whether they think racial and other forms of discrimination occur in the Ontario criminal justice system.

Who did we ask?

To find out what members of the general public think about discrimination in Ontario's justice system, the Commission asked an independent research body, York University's Institute for Social Research, to survey adults from three significant groups in Metro Toronto. The survey was carried out by telephone interviews, in English or Chinese, with randomly selected individuals who identified themselves as black, Chinese or white.

We decided to focus on Metro Toronto rather than all of Ontario because of the high concentration of racial minority communities living in this city. General demographic characteristics of people in the sample — such as

Figure 2-1: Belief that Ontario criminal court judges do not treat everyone the same



income, age, and education — are consistent with the most recent census data. The sample is therefore representative of black, Chinese and white Metro Toronto residents. Interviews were completed with a total of 1,257 people, 417 black, 405 Chinese and 435 white residents (all self-identified).

We surveyed only black, white and Chinese Torontonians because black and Chinese people make up the largest and second largest racial minority groups in Ontario, and we wanted to compare the opinions and attitudes of people from the white majority in Toronto with those of members of racial minority groups.

The main focus of the survey was perceptions of how criminal justice personnel treat white and racial minority people. Since the Terms of Reference direct us to pay special attention to women and youth, we also asked about perceptions of differential treatment based on age and gender. Because many judges and lawyers had suggested that income is the real explanation for what might appear to be racial discrimination in the criminal justice system, we asked about perceptions of differential treatment due to income.

What do Metro Toronto residents think about judges?

As a whole, our findings show that a large proportion of the Toronto population think Ontario's criminal court judges do not treat everyone the same. The following charts provide some details about our findings.

Summary of the Metro Toronto residents' survey

What should we make of these perceptions of inequality in the criminal justice system? The survey shows that a significant proportion of Metro Toronto residents do not believe the justice system actually treats everyone equally.

The survey also shows that Torontonians of all three respondent groups are more likely to perceive discrimination against black peo-

ple than against Chinese people. This finding suggests people perceive a hierarchy of discrimination.

The extent to which black Torontonians perceive bias based on age, wealth, gender and language — as well as race — indicates a widespread lack of confidence in the fairness of the criminal justice system. Since these findings deal with perceptions, they do not measure racial differences in the daily practices of the criminal justice system and their consequences. But findings of opinion are no less important than data about differential outcomes. What people think about the criminal justice system matters because the justice system, more than many other institutions, depends on the confidence of the community. The data disproves any suggestion that only members of small, unrepresentative organizations in the black community perceive differential treatment in the criminal justice system.

Judges' and lawyers' perceptions

We separately surveyed crown attorneys, defence counsel and judges concerning several issues. Here we focus on what judges and lawyers think about racial discrimination in the criminal justice system.

What judges think

Ontario's criminal trial judges are former lawyers called to a provincial bar for at least ten years before their appointments. Judges who sit in the General Division are federally appointed, while appointments to the Provincial Division are Ontario's responsibility.

Judges may participate in pre-trial meetings with crown attorneys and defence lawyers at which agreements are sometimes made about which issues will be contested in court. They are responsible for ensuring that trials are fair, for convicting or acquitting accused persons, and sentencing people convicted of criminal offences.

Figure 2-2: Belief that Ontario criminal court judges do not treat everyone the same, by race of respondents

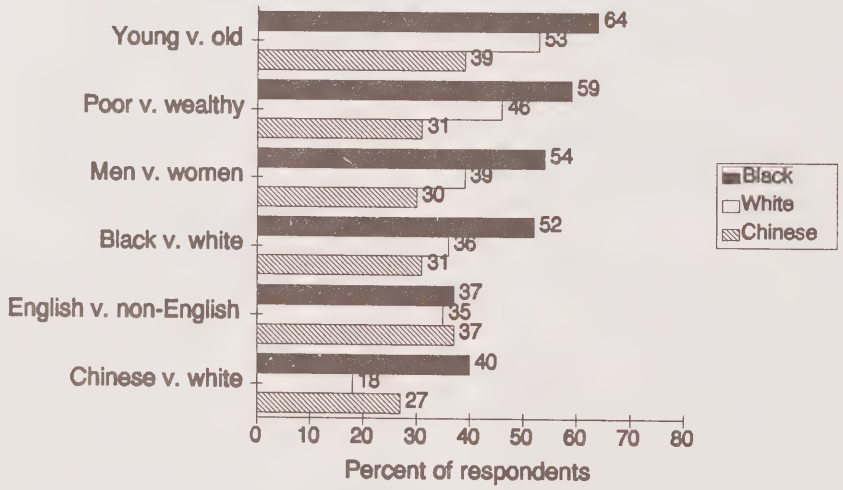
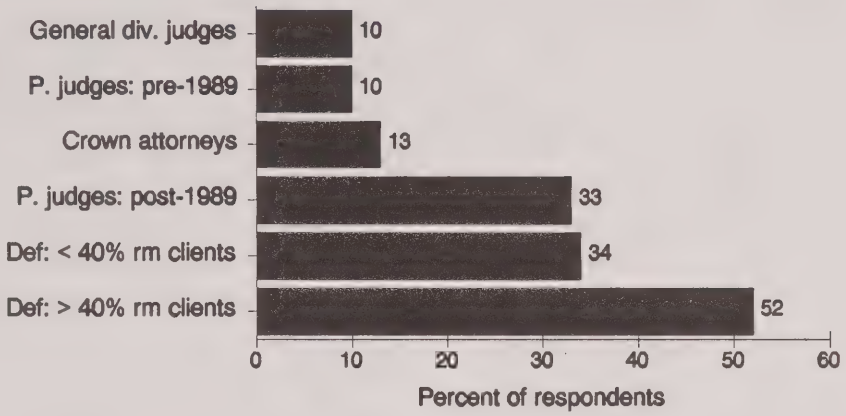


Figure 2-3: Percent of judges and lawyers who think white and racial minority accused are not treated the same in Ontario Criminal courts



P. judges: pre-1989 = provincial division judges, pre-1989 appointments
P. judges: post-1989 = provincial division judges, post-1989 appointments
Def: > 40% rm clients = defence counsel with more than 40 percent racial minority clientele

We asked judges if they think "in general racial minorities are treated the same as white people in Ontario's court system." The majority of provincial division judges — about three in five (64%) — and general division judges — three in four (72%) — agree that the courts generally treat white and racial minority people the same. One in five (19%) provincial division judges and one in ten (10%) general division judges disagree.

We also asked judges if they think "systemic discrimination is a serious problem in [Ontario's] criminal justice system." One in four (25%) provincial division judges, but fewer than one in ten (7%) general division judges, agree that systemic discrimination is a serious problem in the criminal justice system. About five in ten (45%) provincial division judges and three in four (76%) general division judges disagree.

These questions, like many others in the survey, prompted different patterns of responses from provincial division judges appointed before and after changes were made to the appointment procedures in 1989. We found that judges appointed under the new system are much more likely than their longer-serving colleagues to think there are racial differences in how people are treated in the courts. One in three (33%) of the more recent appointments, compared with one in ten (10%) of the longer-serving judges, disagree that white and racial minority people are treated the same.

Judges appointed under the new system are also much more likely to think there is systemic racism in the criminal justice system than their longer-serving colleagues. Close to two in five (37%) recently appointed judges, but fewer than one in five (16%) longer-serving judges, agree that "systemic discrimination is a serious problem in the criminal justice system."

Judges' comments raise similar themes to those of crown attorneys and defence counsel. The dominant view, especially among general

division judges, is that concerns about racism or any other form of discrimination in Ontario's courts have no basis in fact. Judges insisted that **there is no evidence of discrimination in the courts:**

> My experience is that the court is colour-blind. For the most part I can honestly say that minority parties have been treated no differently than any other by judges, juries, courts staff, lawyers, etc.

They explained that **racial minority individuals tend to receive better treatment than white individuals in Ontario's courts:**

> 99% of judges, counsel and court staff bend over backwards to be fair and not to appear racist. [They] often give non-whites more courtesy and consideration than whites.

The judges also claimed that **allegations of racism are excuses for criminality:**

> Too many ethnic groups cry racism! And totally ignore the fact that their particular group is in fact committing a disproportionate number of serious crimes in a particular area.

They suggested that **allegations of racism — and the work of this Commission — reflect a misguided political agenda, rather than a genuine problem in Ontario's justice system:**

> This entire exercise is driven by an overreaction to a small segment of the population who would complain about the conditions in heaven. Not to say we should be complacent or over self-congratulatory; but come on — is it [so] bad that we should throw so much tax money away on yet another commission, study and survey? Wake up and smell the coffee!

By contrast, some judges said **racism and other forms of discrimination are a reality in the administration of justice:**

> I am of the view that there exists systemic racism in the Ontario court system. While many might disagree, awareness programs for those involved in the administration of justice would likely help eliminate the unconscious discrimination. I'm sure many of us, from court personnel to judge, discriminate without being aware of it. Stereotyping is a strong influence we surely suffer without knowing. To a certain extent the more we are exposed to these minorities, the more we can understand.

What crown attorneys think

Crown attorneys are lawyers who act for the state in the criminal justice process. Ontario's crown attorneys deal with *Criminal Code* and serious offences against provincial laws, while federal prosecutors deal with the prosecution of drug charges and other offences contained in federal laws apart from the *Criminal Code*.

Crown attorneys have broad discretion which they exercise within a framework of legal rules and Ministry policy. For example, they may advise police officers and members of the public if there is any legal basis on which to charge someone with a criminal offence. They have the legal authority to seek pre-trial detention of people charged with offences. Crown attorneys also have the authority and a professional duty to decide if

charges that have been laid should be prosecuted. Crown attorneys have the professional authority to negotiate and agree with defence counsel about particular issues that will not be contested.

We asked crown attorneys if they think that, "in general, racial minorities are treated the same as white people" in Ontario's court system. The vast majority — three in four (74%) — agree, or strongly agree, that the courts generally treat white and racial minority people the same. Only one in eight (13%) disagrees.

We also asked crown attorneys about the extent to which racial minorities are discriminated against in the Ontario criminal court system. Most — three in five (61%) — think "discrimination exists, but only in a few areas and only with certain individuals." A minority — about one in five (18%) — think "there is no discrimination against racial minorities in the Ontario criminal court system." Fewer than one in ten (7%) think "discrimination against racial minorities is widespread, but subtle and hard to detect." Only 1% think "discrimination against racial minorities is widespread and easy to observe."

Many crown attorneys responded to our invitation to offer their personal comments on racism in the criminal justice system. As might be expected from the answers summarized above, most said that, in general, racism is not a problem in Ontario's courts. These crown attorneys talked about **the good faith, education and professionalism of individuals who work for justice:**

> Duty and honour are two concepts I sincerely believe are not foreign to the performance of one's function as a professional involved in our criminal justice system, whether you are a judge, counsel, support staff or police officer. Each of these positions are populated in the 1990s by the best-educated people ever. Therefore I find it hard to believe that while incidents of racism may occur ... they are anything more than rare.

Some crown attorneys who think there is no racism in the justice system expressed strong disagreement with the Commission's mandate and work. They maintained that people who believe there is systemic racism in the criminal justice process **do not understand the justice system:**

> Whining about supposed discrimination is a waste of time. The suggestion of discrimination is unfounded.

They claim that those who complain of racial discrimination **are making "excuses":**

> It is far too easy in our society to cry "racism" and not address the real reason for which one is in trouble with the law.

Other crown attorneys, however, are convinced that racism is a genuine problem in the justice system. They talked about **the subtlety of racism:**

> Overt examples of racism in the criminal justice system are rare. It is the subtle examples that are rampant.

The crown attorneys who believe that racial inequality exists within the criminal justice system commented on **the individuals and officials responsible for the racism:**

> Judicial conduct needs to be better scrutinized. Where judges or [justices

> of the peace] make inappropriate comments, etc., the matter should be dealt with. At present, although certain individuals are notorious, nothing is done by the system. By tolerating their behaviour it is condoned, continues and increases.

What defence counsel think

Defence counsel are lawyers who act for persons charged with criminal offences.

Their main discretionary powers concern negotiations with crown attorneys about pleas, facts and sentences; development of trial strategy; and gathering and presenting information about the accused that might influence sentencing. In exercising these discretions, defence counsel are guided by the law, practice, clients' wishes, and their professional obligations to serve the client and the court simultaneously.

We asked defence counsel if they think that, "in general, black and other racial minorities are treated the same as white people [in] the court system in Ontario." Five in ten (50%) defence counsel agree that black and other racial minorities are treated the same as white people; Four in ten (40%) defence counsel disagree.

This question, like many others, prompted different patterns of responses from lawyers with substantial racial minority clienteles (40% or more of their clients) compared with those from lawyers with a smaller proportion of racial minority clients.

Five in ten (52%) lawyers with larger racial minority clienteles think that black and other racial minority people are not treated the same as white people, compared with three in ten (34%) defence counsel with smaller racial minority clienteles. Four in ten (38%) lawyers with larger racial minority clienteles think black and other racial minority people are treated the same as white people, compared with six in ten (56%) defence counsel with smaller racial minority clienteles.

Many defence counsel used the survey as an opportunity to offer comments. Drawing on their experience of the administration of criminal justice, some said they **do not see any racism in Ontario's courts:**

> My observation: you are investigating a non-existent problem. My prediction: you will recommend an elaborate set of measures to deal with the [non-existent] problem.

Other lawyers clearly had different experiences with the administration of criminal justice and talked about **subtle biases against racial minority clients:**

> One never discusses racism but it is clear that issues such as credibility, guilt beyond a reasonable doubt, and innocent till proven guilty become unclear if your client is black or yellow. The problem is not only police- and crown-related.

These lawyers also commented on **the exercise of discretion:**

> Assumptions are made by police, crowns and judges that certain racial minorities are more likely to be guilty of certain categories of offences, and discretion is exercised or restricted accordingly.

They also alleged **racist conduct behind closed doors:**

> I am often appalled that judges, crowns, police officers and even de-

> fence counsel assume they are speaking to someone who agrees with their racist point of view.

These defence lawyers who perceived racism in Ontario's courts talked about **the responsibilities of police officers, judges and to a lesser extent, crown attorneys and defence counsel for racism in the criminal justice system:**

> If there is significant discrimination against minorities, it is worst against blacks. Police have a perception of the black community as a criminal subculture ... Mercenary, high-volume legal aid defence counsel are even less likely to be concerned for the rights of black clients if those rights get in the way of expediency and a fast buck.

Several defence lawyers perceived systemic biases in the justice system and the vulnerability of racial minority accused to these biases, but said **disadvantageous treatment is mostly or really due to reasons other than race:**

> The differences seem to me very much "systemic" — that white accused are able to show more often than racial minorities those things (wealth, employment, drug rehabilitation, family support, community support, etc.) which impel crowns, police and judges to extend bail or sentencing leniency. Class biases overlap with racial biases.

Summary of judges' and lawyers' perceptions

These findings make two important points. First, there is substantial variation among justice professionals in their perceptions of racial discrimination in Ontario's criminal courts.

Second, as the quotations from the surveys illustrate, many justice professionals reject even the possibility that systemic racism might be a genuine problem in Ontario's criminal courts.

Many of the survey comments suggest that class or income bias inherent in Canadian society is transmitted into the court system through the workings of other social institutions, such as the education system and labour markets. Since the existence of class or income bias is not thought to reflect badly on individual judges or lawyers, it may be easier for justice professionals to acknowledge this problem without feeling personal responsibility for it.

By contrast, many of the survey comments tend to treat any suggestion of racial bias in the court system as an attack on the personal integrity of the respondents. This response suggests that racial bias is understood to mean deliberately unfair decisions, made by specific individuals and motivated by negative judgments about races. This narrow view — that any racial bias in the courts must reflect deliberate wrongdoing — has led to indignant denials of this endemic social problem in Canadian society.

It is important to understand the adverse consequences of racism even when they do not result from deliberate motives. These more subtle forms of racism require greater effort to identify and eliminate. Co-operation and initiative from those most directly involved in the criminal justice system will be crucial to achieving both the perception and the reality of true equality in Ontario's criminal justice system.

Conclusion

It is important to restore public confidence in the criminal justice system. The Commission's findings show that a large proportion of black Torontonians appear to have little confidence that the criminal justice system delivers justice equally. Many white and Chinese Torontonians share this view.

The Commission's findings also show that justice system officials are divided over whether the criminal justice system delivers equal justice to residents of Ontario. The findings suggest that a substantial proportion of all respondents feel that discrimination is common. These findings can no longer be dismissed as attacks by those who do not understand the criminal justice system.

The Commission's findings are a call to take seriously the concerns raised, and to use available resources to improve and deliver what is now only a promise of equality. Among these resources are the justice system officials and Ontario residents who acknowledge the problem and are willing to provide leadership in creating solutions.

3

Racism in Justice: Understanding Systemic Racism

What is Systemic Racism?

By systemic racism we mean the social production of racial inequality in decisions about people and in the treatment they receive. Racial inequality is the result of a society's arrangement of economic, cultural and political life. It is produced by the combination of: social constructions of races as real, different and unequal (racialization); social systems' norms, processes and ways of delivering services (structure); and the actions and decisions of people who work for social systems (personnel).

What is Racialization?

Racialization is the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life. It involves: selecting some human characteristics as meaningful signs of racial difference; sorting people into races on the basis of variations in these characteristics; attributing personality traits, behaviours and social characteristics to people classified as members of particular races; and acting as if race indicates socially significant differences among people.

Races are a product of, or created by, racialization. Without racialization they would not exist. Race is a myth because it is impossible to sort humanity into distinct racial groups using any scientific standard. Variations among human beings do not form regular patterns that allow objective classification of people into different races. Whatever criteria are used to assign people to a racial category — such as skin colour, hair form, nose shape or height — the evidence shows, conclusively, that similarities among many people placed in different racial groups are greater than those

among members of the same groups. Moreover, supposed indications of race neither cause a person to behave in predictable ways, nor do they reveal anything about the person's character. Even though science cannot offer any coherent basis for dividing humanity into races, the systems that societies use to accomplish things may reflect or incorporate racialized judgments.

Sometimes racialization is explicit, official and supported by law, such as apartheid. Racialization can still have powerful effects even where it is only an implicit and unofficial feature of the system. In such situations it is revealed by what people do and how institutions function. *Racialization is active in any social system in which people act and institutions operate as if race represents real and significant differences among human beings.*

What are used as signs of racial difference?

Racialization needs a sign of difference to sort people into categories. Signs of origin indicate who should be categorized into which racial group. Inherited physical characteristics are the main signs used to determine racial group membership. Ethnicity, culture and place of birth are also used to create racial groups.

Why are perceived racial differences significant?

Racialization attaches meanings to perceived racial differences stemming from the historical origins of the racialization and the purposes for which it is used. Judgments and assumptions about racial differences generally take the form of hierarchical or graded comparisons. In Canada these meanings are based on perceived relationships between the skills, characters and capacities of white people and those of people defined as racially different.

The dominant meanings of racial differences in Canada arise from two important systems: imperialism and immigration. European empires of the 16th and 17th centuries used racial difference to justify exploitation of the people, lands and resources of other societies. In this process the elites of England, France, Spain, Portugal and the Netherlands defined members of the societies they exploited as inferior, savage and strange, and themselves as superior, civilized and normal. The imperial powers also used these meanings to justify enslaving African peoples and transporting them to the Americas.

As well as justifying economic exploitation, these meanings of racial difference were incorporated into and spread throughout European imperial societies through religion (predominantly Christianity), education, culture and politics. Today, these meanings are well established in many societies, including Canada.

Immigration systems, like imperial systems, may judge racial groups as inferior or superior, normal or strange, civilized or savage. These immigration systems use race to measure the applicant's compatibility with the receiving society.

Emphasis on compatibility with (white) Canadian identity for the purposes of immigration has in turn influenced the meanings attached to racial differences among residents of Canada. Many white-skinned people are not racialized as white or ethnic, or as members of a different culture. Their signs of origin are invisible because they are defined by their skin colour as "Canadian." These Canadians have the comfort of leading their everyday lives without being faced with the expressed or implicit questions about their origins or whether they belong in this country.

By contrast, constructions of other Canadians as "foreign" and judgments that they are incompatible persist long after migration to

this country. Descendants of early black, Asian and South Asian settlers, whose only home is Canada, may find they are considered as outsiders, and presumed not to understand "Canadian ways."

The spread of racialization throughout social systems

Racialization may produce racial inequality in social systems, which are organized processes for delivering services. Institutions such as the police, courts and prisons are systems, as are community organizations, governments and corporations.

Systems consist of: people, their attitudes and beliefs (personnel); values, procedures, policies and informal rules (operating norms); ways of making decisions; and methods of delivering services. These elements continually affect one another over time and together comprise a perceived whole. The totality of a system's norms and processes and the actions of its personnel comprises its systemic practices.

Racialization in any element of a system or sub-system has the capacity to instill racialization into systemic practices, that is, to support or transmit racialization to other parts of the system. Unless constant vigilance is maintained, racialized elements of a system may also spread racialization into its practices. Furthermore, racialization in any system may be transmitted to any others that are related.

How people instill racialization into systems

People instill racialization into social systems when they act as if races are real, different and unequal. They may act in this way because they are personally hostile towards members of racialized groups and the system does not stop them from expressing this hostility. Manifestations of such hostility are commonly described as overt racism.

People who are not personally hostile to racialized people may also act as if races are real, different and unequal. They may do so because such conduct brings rewards, makes life easier, helps them fit in with their colleagues, or is simply expedient. If their conduct explicitly relies on racial categories, it may also be called overt racism. If not, it may be known as covert, subtle or implicit racism.

Racially abusive language adds another dimension to the spread of racialization. When white people in positions of power insult black or other racialized individuals in racially abusive terms, their words reflect society's judgments about the superiority of white people and inferiority of others. Racist language has this effect whether or not it is intended, because these judgments are built into the meaning of the words. Consequently, racial abuse both insults the targeted person and expresses a history of general contempt for the person's racial group.

For example, correctional officers who use racially abusive language to prisoners transmit racialization into prison systems, resulting in overtly racist incidents. These incidents may have a variety of causes. Personal hostility towards black or other racialized people may be one factor, lack of professionalism another, and control a third. Each results in racialization in a system and in explicitly racist incidents. However, identifying the different factors at work is critical to finding appropriate remedies.

How decision-making injects racialization into systems

Decision-making injects racialization into systems when the standards or criteria for making decisions reflect or permit bias against racialized people. Standards and criteria are part of a system's operating norms and may be

formal and explicit in laws, policies and procedures. Or they may be informal standards, arising from accepted ways of doing things.

Racialized bias in decision-making results in racial inequality in treatment and outcomes. These inequalities may in turn promote racialization in the system where bias occurs, and in related systems. This occurs when people see the disparities as proof that races are real, different and unequal – rather than as a product of the system's decision-making.

Inherent bias in standards for decision-making

Standards may be inherently biased against racialized people. This type of direct bias exists where standards treat something explicitly linked to a person's origin as relevant to the decision. It may be inherent in formal operating norms, for example, when immigration systems demand higher skills of black or other racialized people who apply for entry than of non-racialized people. Bias may also be inherent in informal criteria. Standards may also be inherently biased if they use apparently neutral criteria that penalize racialized people. The discrimination that results from such standards is generally called indirect.

Transmitted bias in decision-making

Social systems require several decisions to be made at different stages by different system personnel. Choices or decisions made at one stage of the process affect other decisions made within the system. Racialization in one part of the system is highly likely, unless precautions are taken, to be transmitted into others.

How service delivery may support racialization

Whether a social system supports racialization may be revealed in the organization or delivery of its services. Any apparent acceptance of racialization may significantly diminish public confidence that the system treats people equally. Nearly always, systems used by substantial numbers of black or other racialized people, but staffed almost exclusively by white people, give the appearance of supporting racialization.

The criminal justice system may be able to show that it does not deliberately exclude Aboriginal, black or other racialized people from employment, and that it maintains no obvious barriers to hiring them. This is not enough to reassure users that the criminal justice system repudiates racialization, and a system that is unable to persuade its users that it rejects racialization risks being perceived as endorsing it.

The relationship between operating norms and racialization in social systems

Systems manage personnel, decision-making and service delivery through law, internal procedures and policies. These informal rules are the often unspoken understandings about how the day-to-day work of the institution is conducted. Operating norms that set out inherently biased standards for decision-making directly transmit racialization into a system. They may also encourage further racialization in the system by promoting stereotypes and assumptions that races are real, different and unequal. Operating norms may tolerate racialization in systemic practices. There are three main forms of toleration: passive toleration, disregard, and collusive toleration.

Passive toleration of racialization reflects lack of awareness that it pervades the system. This exists when people responsible for the work of an institution fail to see evidence of racism in its practices, because practices are

not monitored.

Disregard is a more active toleration of racialization and exists when an institution knows about racism in its practices, but its operating norms do not produce an effective response. Sometimes disregard results from a system's operating norms not treating racial equality as a priority. People may know of racist incidents but ignore them because they think such events happen only on a small scale, or are isolated incidents. Disregard may also occur if decision-makers are unclear about how to eliminate systemic racism, and the operating norms do not encourage development of the necessary expertise.

The third form of institutional toleration of racism — collusion — occurs when operating norms encourage practices based on racialized standards. This form of systemic racism is active in the sense that the institution promotes the rules or norms. It is also explicit in the sense that the norms or rules are clearly acknowledged as acceptable.

In Canada today, however, the offending norm is rarely motivated by racial hostility. A rule may have been adopted for an apparently legitimate reason, but it is discriminatory against racialized people. The essence of collusive toleration is not the intention behind the rule, but the practice it promotes.

Systemic racism: summary of the process definition

Systemic racism is a complex social process. It is the underlying process that makes specific incidents, acts and consequences "systemic." This process in turn consists of other social processes. One of them is racialization, the other is the system.

Racialization in Canada consists of classification of people by reference to signs of origin and judgments about the character, skills, talents and capacity to belong in Canada that signs of origin represent. These social constructions of people as members of distinct racial groups with predictable personalities, behaviours and abilities to fit in are transmitted and reinforced through use. Social systems — ways of organizing activities and accomplishing tasks — involve processes which do not inherently contain or perpetuate racialization. However, they may do so by incorporating it into their operating norms and decision making and perpetuating it in service delivery.

Both the introduction and perpetuation of racialization in these social systems occur through personnel. However, it is often impossible to identify any one or more persons responsible for introducing racialization because the classifications and judgments are built into the system's operating norms. This process of adopting and perpetuating racialization within these social systems constitutes systemic racism.

System personnel, the means by which a social system applies and transmits racialization, are also the only people who can eliminate it and protect the system against its return. While the staff and officials of a system cannot be expected to succeed on their own, they have to be committed to making racialization intolerable if they want to bring about real, effective and permanent change.

Recognizing and eliminating systemic racism

Systemic racism is revealed by incidents, acts and consequences and is recognized by its impact on racialized people. Elimination of systemic racism begins with detecting its impact. Systemic practices must be investigated to find out what purposes racism serves in the system and how racialization is being inserted, transmitted and supported. Then appropriate reforms can be developed and

implemented.

There are two approaches to recognizing racism by its impact. One emphasizes experiences of racialized people; the other compares outcomes of decisions to grant or withhold benefits affecting racialized and non-racialized people..

In the experience-based approach, perceptions of exclusion and injustice that racialized people may have as a result of how they are treated are crucial to recognizing racist impact. Like other methods, however, experience has limits. People experience the same events or practices differently. Thus a decision to believe the experiences of one person or group immediately poses the question of why the experiences of other people or other groups are less valid? Experience, even if presented with sincerity, coherence and balance, may fail to convince those who simply believe in another version of the truth. Even within a particular group, experiences may vary widely. For example, the comments of judges and lawyers reported in Chapter 2 illustrate radically different experiences about the extent to which systemic racism is a problem in the Ontario criminal justice system.

A second limitation of relying on experience to recognize racism is that gaining access to experiences is difficult. Few enjoy publicly recounting incidents in which they felt humiliated, and the impact of racism is for many among the most degrading experiences of their lives. Also, sceptical responses to experiences of racism tend to make people more reluctant to talk about its impact.

As an alternative to experience, impact tests for racism may compare the results of systemic practices on racialized and non-racialized people. Such comparisons look for suspect patterns with standards used to make decisions, or in the way that standards are applied. Comparative approaches often use statistical methods to identify patterns. Statistical comparisons are often seen as more objective and reliable than other ways of establishing systemic racism.

These methods also have their limits. Over-reliance on quantitative measurement may lead people to think too narrowly about racism. A narrow approach risks missing or misunderstanding relationships between racialization and other factors that may influence systemic practices, including other social divisions. A narrow approach may also miss the influence combinations of factors may have on decision-makers.

Conclusion

Racism has a long history in Canada. It has led to denials of basic civil and political rights to Canadian citizens. It excluded adults from jobs and children from schools, limited opportunities to acquire property, and barred people from hotels, bars, theatres and other recreational facilities. In these ways, racism has restricted the life-chances of some Canadians while it benefited others.

Though many Canadians throughout history have accepted racism, others have vigorously resisted it. These efforts have had significant results. While the law once promoted or permitted unequal treatment because of race, today it generally prohibits such discrimination.

Despite these important achievements, racism is still entrenched in Canadian society. Racism in Canadian society continues to shape the lives of Aboriginal, black and other racialized people. In order to make further progress in eliminating racism, Canadians must grapple with racism's systemic dimensions.

4

Prison Admissions

The Commission examined whether the exercise of discretion in the criminal justice system harms black people, particularly in relation to imprisonment before trial and after conviction. We emphasized imprisonment because it is the harshest and most intrusive action the that the government can impose on individuals.

Our main finding about prison admissions was that black men and women and male youths in general are massively over-represented. The over-representation of these groups in prisons has increased dramatically in recent years. The problem is even worse for pre-trial admission than for admission after conviction and sentencing.

Who goes to Ontario provincial prisons and why?

Accused persons awaiting trial; young offenders sentenced to prison; and adults sentenced to prison terms under two years are held in provincial institutions.

Most people sentenced to terms in Ontario prisons are either charged with or convicted of non-violent offences. The majority of cases involve crimes against property rather than against people. This is true for both pre-trial and sentenced admissions. Drug charges and offences against the administration of justice also account for a significant number of prisoners.

The imprisonment of non-violent offenders suggests that imprisonment is over-used. Imprisonment is extremely costly and does little to rehabilitate offenders. Justice system officials should exercise restraint in turning to imprisonment as a solution for non-violent offenders. Our finding of racial inequality in prison admissions provides another reason for justice system officials to consider alternatives to imprisonment for non-violent offenders that offer the prospect of "rehabilitation."

What did we find?

It is important to note that the total number of prisoners in the Ontario prison system has remained relatively constant: it is the percentage of black men and women and male youths that has increased.

Ontario prison data show that from 1986/87 to 1992/93 the number of black prisoners admitted to Ontario prisons increased by 204%, while the number of white prisoners admitted increased only 23%. Data from 1992/93 show that among total admissions blacks and Aboriginals are over-represented relative to their proportions in the provincial population, while Asians, East Indians or Arabs are under-represented.

Table 4-1: Adult admissions to Ontario prisons, 1986/87 and 1992/93

	1986/87		1992/93		Change between 1986/87 & 1992/93	
	%	Number	%	Number	% change	Number
White	83.4%	49,555	73.1%	60,929	+23.0%	+11,374
Black/brown[1]	7.1%	4,205	15.3%	12,765	+203.6%	+8,560
Asian	0.9%	549	2.0%	1,686	+207.1%	+1,137
Aboriginal	8.3%	4,958	5.9%	4,921	-0.7%	-37
Other/unknown[2]	0.3%	162	3.7%	3,100	+1,813.6%	+2,938
Total	100.0%	59,429	100.0	83,401	+40.3%	+23,972

Source: Ontario Ministry of the Solicitor General and Correctional Services

1. These are the original racial categories from the 1986/87 database. In order to make comparisons, the "Black/brown" category for 1992/93 includes people classified as either "Black" or "East Indian."
2. In 1992/93 the "Other/unknown" category includes people who were classified as either "Arab" or "Other" (categories not used in 1986/87).

Table 4-2: Admissions of youths aged 16 and 17 to Ontario prisons, by sex and race, 1992/93

	Female	Male	Total
White	70.8%	71.9%	71.8%
Black	1.5%	13.3%	12.5%
Aboriginal	22.0%	6.3%	7.5%
Asian	2.4%	3.0%	3.0%
East Indian	0.3%	1.3%	1.3%
Arab	0.9%	0.8%	0.8%
Other/unknown	2.1%	3.3%	3.2%
Total percent*	100.0%	99.9%	100.1%
Total number of admissions	336	4,369	4,705

Source: Ontario Ministry of the Solicitor General and Correctional Services.

* Percentage estimates may not add up to 100% due to rounding.

Table 4-3: Admissions of youths aged 16 and 17 to Ontario prisons,by race and reason for admission, 1992/93

	Remanded	Sentenced	Other reason	Total
White	70.4%	76.0%	73.4%	71.8%
Black	13.1%	10.0%	13.1%	12.5%
Aboriginal	7.4%	7.7%	7.2%	7.5%
Asian	3.4%	2.2%	1.6%	3.0%
East Indian	1.4%	0.7%	1.2%	1.3%
Arab	0.9%	0.7%	0.2%	0.8%
Other/unknown	3.3%	2.8%	3.2%	3.2%
Total percent*	99.9%	100.1%	99.9%	100.1%
Total number of admissions	3,289	919	497	4,705

Source: Ontario Ministry of the Solicitor General and Correctional Services
* Percentage estimates may not add up to 100% due to rounding.

Table 4-4: Adult admissions to Ontario prisons, by sex and race, 1992/93

	Female	Male	Total
White	67.4%	73.6%	73.1%
Black	17.1%	13.4%	13.7%
Aboriginal	9.2%	5.6%	5.9%
Asian	2.0%	2.0%	2.0%
East Indian	1.0%	1.6%	1.6%
Arab	0.3%	0.8%	0.7%
Other/unknown	3.1%	3.0%	3.0%
Total percent*	100.1%	100.0%	100.0%
Total number of admissions	6,998	76,403	83,401

Source: Ontario Ministry of the Solicitor General and Correctional Services
* Percentage estimates may not add up to 100% due to rounding.

Table 4-5: Adult admissions to Ontario prisons, by race and reason for admission, 1992/93

	Remanded	Sentenced	Other reason	Total
White	68.9%	79.9%	61.5%	73.1%
Black	16.1%	9.0%	25.8%	13.7%
Aboriginal	6.0%	6.3%	2.8%	5.9%
Asian	2.9%	1.0%	2.1%	2.0%
East Indian	2.0%	1.1%	1.8%	1.6%
Arab	0.9%	0.4%	1.4%	0.7%
Other/unknown	3.2%	2.3%	4.6%	3.0%
Total percent	100.0%	100.0%	100.0%	100.0%
Total number of admissions	41,195	36,188	6,018	83,401

Source: Ontario Ministry of the Solicitor General and Correctional Services

Black and Aboriginal women are even more over-represented among prison admissions than are black and Aboriginal men. Data from 1992/93 also show that blacks, Asians, South Asians and Arabs are admitted to prison at much higher rates before trial than after conviction, while whites and Aboriginals are admitted to prison before trial at about the same rates as they are after conviction.

How do Metro Toronto prisons measure up?

The disparity between white and black admissions is even starker when we focus on prisons serving the Metro Toronto area. The **Metropolitan Toronto West Detention Centre** is typical of Metro: In 1986/87, about 75% of male admissions were white and about 11% were black. In 1992/93, white admissions amounted to less than 60% and black admissions to more than 30%.

Although admissions of white women have increased, increases in black female admissions are much larger. In 1992/93 the **Metropolitan Toronto West Detention Centre** (women) admitted 52% more white women than in 1986/87 but admitted 148% more black women in 1992/93 than in 1986/87.

How do black and white admissions compare in drug trafficking charges?

The reported increases in black and white admissions cover a range of charges, but one category dominates: drug trafficking/importing. The increases in white admissions are large at most of the prisons but appear minor when compared with the increases in black admissions on the same charges. At **Vanier Centre for Women**, for example, white prisoners admitted for drug trafficking/importing increased by 667% from 1986/87 to 1992/93. By contrast the number of black admissions at Vanier for the same offences increas-

ed by 5,200% over the same period. The data show that most 1986/87 trafficking/importing admissions were white, but by 1992/93 the majority were black.

What explains these remarkable trends?
Two general factors are evident: expansion of prisons and changes in criminal justice practices. During the 1980s, the province embarked on a large prison expansion program. By 1992, Ontario's prison capacity was 30 percent higher than in 1985. Meanwhile, Quebec maintained its prison capacity at the 1985 level. In 1992, Ontario's recorded crime rate was about the same as Quebec's, but the imprisonment rate was one-third higher.

Expansion of Ontario's prisons is clearly associated with overall increases in prison admissions. Why, though, have admissions of black women and men grown so much faster than admissions of white women and men? At least part of the answer can be found in Canada's "war on drugs."

From the mid-1980s, Canada has followed the United States in emphasizing law enforcement as a primary strategy to control drug use. Such policing is supported by vigorous prosecutions, and a strong preference for imprisoning convicted offenders no matter how small the amount of drugs involved.

How does this "war on drugs" produce racial inequalities in imprisonment?
Neither patterns of drug use nor control over drug supply explain our findings. No evidence shows that black people are more likely to use drugs than others or that they are over-represented among those who profit most from drug use. Events of the last few years show, however, that intensive policing of low-income areas in which the majority of residents are black produces arrests of a large and disproportionate number of black male street dealers. Similarly, intensive policing of airline travellers produces arrests of a smaller, but still disproportionate, number of black female couriers.

Unfortunately, the arrests, convictions and imprisonment of street dealers and drug couriers does not stem the supply of drugs. Those directing the organized crime remain untouched. Experts in drug policy are clear: law enforcement directed at small-scale traders and couriers has an insignificant impact on drug use. It is a waste of resources. Many police officers, lawyers and some judges (including some we consulted) acknowledge this. They know that effective drug policies emphasize treatment and prevention of abuse. Such strategies focus resources on existing and potential drug users, not petty suppliers. Without a local demand for drugs, street trading would disappear and small-scale couriers would not be recruited.

It is clear from our findings that in Ontario, as in many parts of the United States, one effect of the "war on drugs," intended or not, has been an increase in the imprisonment of black people.

However, not all of this growth in racial inequality in prison admissions is due to drug charges. To find out more about the patterns of racial inequality among admissions, the Commission analysed data for 1992/93, the first year of our mandate, in more detail. The findings are summarized in these tables.

These findings clearly demonstrate that black people are vastly over-represented in an area where the criminal justice system has its harshest impact — imprisonment.

Why are black people over-represented among prison admissions?
What explains the dramatic increase in the imprisonment of black women and men since 1986/87? Why is there such a large difference

in imprisonment rates of black and white people for some offences and much smaller differences, or even under-representation of black people, for other offences?

One superficial answer is that the data "prove" that black people are inherently criminal. This explanation does not fit the facts. Another equally superficial answer — and equally unconvincing — is the conclusion that all white police officers, lawyers and judges are blatantly racist and deliberately criminalize black people.

Some people who rightly reject biological explanations of criminal activity find cultural ones persuasive. Are cultural propensities to criminality, violence or lack of respect for law and authority the reasons for racial inequality in admissions to Ontario's prisons?

If all or some black cultures are inherently criminal, but white cultures are not, why are the vast majority of prison admissions people from white cultures? If black culture causes criminality, what explains the relatively low proportions of black admissions in 1986/87 and the massive increase since then?

The answer, of course, is that cultural characteristics do not explain the evidence. Some studies emphasize the failure of black people to integrate fully into the wider society. These studies draw on evidence of disproportionately high rates of unemployment and dead-end jobs among black people, particularly young adults. They also rely on poor housing conditions and lack of educational opportunities. These studies hold that members of racialized groups are much more likely than members of non-racialized groups to have limited chances and opportunities. They conclude that since people with limited social and economic opportunities are most likely to be policed, prosecuted and punished as criminals, racialized people are more likely than white people to be in conflict with the law.

According to this view, a person's social and economic background is a critical factor leading to participation in criminal activity. Assuming for a moment that this theory is true, the criminality rate should be the same for racialized and non-racialized people who experience the same social and economic conditions.

This viewpoint does not imply that lack of economic opportunities or social inequality causes individuals whether white or racialized to commit crimes. It does say, rather, that people with limited chances of social and economic success may be more likely than more fortunate people to turn to criminal activity instead of making other possible, non-criminal life choices.

Experts who adhere to this viewpoint look for alternatives to imprisonment because it does not appear to effectively deter or reduce crime. They emphasize crime prevention, as opposed to punishment.

Who gets caught and who gets away?

Other explanations for the racial inequality in prison admissions also stress social and economic conditions, but from a different perspective. Social and economic conditions are seen as explanations of who gets caught, not who commits the crimes. The emphasis is on how the law is enforced rather than on who breaks the law.

People who hold this view argue that involvement in criminal activity is not limited to an identifiable group of anti-social and marginal individuals. Criminality is instead a widespread social phenomenon in which many ordinary and apparently respectable people participate.

If criminal activity is indeed widespread among the population, the explanation for racial patterns in prison admissions cannot be attributed mainly to the disproportionate

involvement of racialized groups in crime. Variations in enforcement practices likely make the difference.

Formal and informal selection criteria, such as poverty, are used in law enforcement. Offences by those at the bottom of social and economic hierarchies are more likely to be policed, prosecuted and punished severely than the same offences by wealthier people. Experts suggest that these criteria make black and other racialized people particularly vulnerable.

The type and location of the offence also influence law enforcement. Crimes committed in the privacy of corporate offices tend to be more difficult to detect and prosecute than street crimes because of their low visibility, and because the law generally shelters these private spaces from state officials.

Who has discretion and how do they use it?

Many explanations of racial inequalities in prison admissions point to racial discrimination in the administration of criminal justice. They emphasize that the criminal justice system requires police officers, lawyers, justices of the peace and judges to make judgments about individuals and their (alleged) behaviour. Though the law provides a general framework for these judgments, the discretion it delegates allows considerable scope for interpretation of the standards to be imposed, the individual and the (alleged) offence.

Here is an overview of the various stages of Ontario's criminal justice system where discretionary authority may allow discrimination.

How does the criminal justice process get started?

The first step into the criminal justice system is the laying of charges.

How do officials find out about behaviour that might result in criminal charges?

Victims and witnesses report crime

Victims and witnesses are an important source of information about crimes. Their decision about whether to report a crime is crucial. Many individuals harmed by criminal offences do not tell the police.

A 1993 Canadian study of the reporting of eight types of violent and property offences, for example, found that 90% of sexual assault victims and almost 70% of victims of non-sexual assaults did not inform the police.

Such selective reporting raises the question of whether racialization can influence victims and witnesses in exercising this important discretion. Studies suggest that white victims are more likely to report crimes resulting in less serious injury or no injury to them if they perceive the perpetrator to be non-white than if they think the perpetrator is white.

Police detect crime

Police detection of alleged offences may stem from planned and systematic work, such as when they conduct undercover operations in street drug markets or among sex trade workers. Police detection of crime may also arise from encounters they initiate such as stopping people on the street during routine patrols.

Whether or not it is planned, such proactive policing is highly discretionary. Planned proactive policing requires choices about which types of offences to target, what resources to devote to enforcement, and which strategies to use.

Much evidence from other jurisdictions indicates that this type of policing disproportionately pulls black people into the criminal

justice system.

Once the police have information identifying a person with an alleged criminal offence, they must decide whether to charge the suspect. They may instead do nothing, simply caution the suspect, or advise the victim how to lay charges.

When exercising discretion over which charges to lay, if any, police officers must compare the alleged behaviour to the offences set out in the *Criminal Code*. By so doing, the police end up interpreting both the alleged behaviour and the provisions of the *Criminal Code*. The police have the discretion to decide whether a single incident merits one charge or several distinct charges. The police also have the discretion to decide whether the particular facts of the incident should be treated as evidence of a more or less serious charge among several that could be laid. This broad discretion provides considerable scope for police officers' personal attitudes an perceptions to influence their decisions.

For example, an 18-year-old who shoves another and runs off with the other's baseball cap could be charged with robbery (punishable by up to life imprisonment), theft (two years), assault (five years) or possession of stolen property (two years). As an alternative to laying charges, the police could instead talk with the teenager, perhaps in the presence of family members. This range of choice provides considerable scope for police officers' personal attitudes, perceptions and stereotypes to influence their decision. Even when an officer is acting with conscious fairness and objectivity, subtle influences may arise such as, in this example, whether the teenager comes from what the officer perceives to be a "good" or "stable" family. This assessment might lead to the conclusion that a black youth should be subjected to the criminal justice process, whereas a white youth could be dealt with adequately in the home.

The particular charges laid affect the possibility of imprisonment both before trial and after conviction. Persons charged with offences that could result in a prison sentence if they are convicted, for example, may be held in a provincial prison until they are tried. For moral, legal and practical reasons, however, most accused people are not imprisoned before trial. The nature and number of the charges laid are crucial in police and court procedures for deciding which accused people will be sent to prison.

Some Ontario residents strongly believe that the police generally discriminate against racialized people and studies document class and other biases in police practices.

Bail or imprisonment pending trial?

Once a charge is laid, the next critical set of decisions concern whether to hold accused persons in prison or to seek other court imposed controls on them during the period before trial.

Police have discretion in some circumstances to release the accused at the scene or from the station. Race may influence police decisions about whether to release accused persons. If the police cannot or will not release the accused, they have a discretion about what information to supply to crown attorneys, which may affect bail proceedings.

When crown attorneys are deciding what position to take, and bail justices what decision to make in court, they consider the seriousness of the charges and the accused's criminal record. Other criteria may include "ties to the community", employment status and mental health. The bail justice must issue a release order if not persuaded that imprisonment is necessary to protect the public or ensure that the accused will stand trial. However, racialized decisions may also be pro-

moted by criteria used to predict whether the accused will fail to appear at trial or is "substantially likely" to commit a criminal offence before trial.

Can charges be resolved without a trial?
Once charges have been laid, crown attorneys assume responsibility for how they are processed. Crown attorneys have a professional duty to scrutinize charges and decide whether some or all should be withdrawn. They may also engage in resolution discussions with defence counsel to see if charges can be disposed of without a contested trial.

Police choices about the nature and number of charges to lay remain important because they may affect the likelihood of resolution discussions, as well as the discussions' substance and outcomes. Fewer and less serious charges, for example, may leave crown attorneys less to offer as an inducement for a guilty plea.

For some charges, crown attorneys have the discretion to proceed summarily or by indictment. This decision determines whether the accused person, if convicted, will face a lesser or greater maximum penalty.

Since crown attorneys make their decisions mostly on the basis of written material rather than interaction with accused persons, there seems to be little scope for racialization to influence their choices. Nonetheless, both our research and research in other jurisdictions suggests that the possibility cannot be dismissed. Much of the crown attorneys' information is supplied by police officers who have met the accused and may have formed racialized judgments about the accused.

Other clues to accused persons' racial origin may be recorded on paper. Their names, countries of birth and physical descriptions are all normally included in the information available to crown attorneys. Moreover, some residential areas are identified with racialized communities, so that even an address may be taken to suggest the race of an accused. How often crown attorneys implicitly or explicitly make assumptions about race based on this information, and to what effect, is not known.

Is there discretion at trial?
Even if charges have been resolved through plea discussions, the accused person must still appear in court. Judges always have the discretion to decide on an appropriate sentence, but they generally adopt joint proposals from the crown attorney and the defence counsel. Consequently, in cases with a guilty plea, potential for racial inequality in sentencing may arise from the resolution discussions that led to the plea and from judges' responses to sentencing proposals.

An accused who contests the charge(s) appears in court for a trial at which verdicts and any punishment are determined. Trials are adversarial processes in which crown attorneys and defence lawyers compete to influence judges and juries. If there is any possibility that decision-makers may be swayed by racism, one side or the other may use it.

This risk of racism has been raised concerning jury trials of white police officers charged with shooting black persons. It has also been addressed concerning jury trials of black and other racialized accused.

Sentencing is highly discretionary. The *Criminal Code* sets out maximum sentences for each offence, that are intended for the worst examples of the offence, committed by offenders with the worst criminal records. When exercising their sentencing discretion, judges assess the offence, the offender and the harm that the offence caused. Judges rely on evidence presented during the trial and information about the accused provided by crown attorneys and defence lawyers after a finding

of guilt. Judges may also consider character references, professional assessments of the accused, and victims' statements about the damage caused by the offence.

Disparity is a known problem in the Canadian sentencing process. The question raised by the prison admissions data is how far this disparity is patterned by racialization. Do judges' decisions produce racial inequality in sentencing outcomes?

What is the result of broad discretion?
Black women, men and youth in Ontario disproportionately experience imprisonment. This massive inequality in Ontario prison admissions is a relatively recent occurrence.

Racialization in Canadian society is recognized by many both inside and outside the justice system. Wherever broad discretion exists, racialization can influence decisions and produce racial inequality.

The criminal justice system operates through broad discretion. This discretion is exercised in subtle, complex and interactive ways. There is considerable scope for racialization to influence practices and decisions, and for bias to be transmitted from one stage of the process to others.

We now turn to more detailed examination of the exercise of discretion at several important points in the criminal justice process.

5

Pre-trial Imprisonment

Our preliminary consultations revealed serious and persistent concerns that systemic racism makes black and many other racialized accused in Ontario particularly vulnerable to imprisonment before trial. From our research we concluded that black accused are more likely than white accused to be imprisoned before trial. We found that the decision to imprison an accused is significantly influenced by the race of the accused.

Why are people imprisoned before trial?
The use of imprisonment before trial, sometimes known as "detention" or "custody," is:

- to ensure the accused person attends trial;
- to ensure that the accused does not have an opportunity to commit an offence before trial.

Are there disadvantages to imprisonment before trial?
Imprisonment before trial interferes with liberty, and deliberately inflicts suffering on people who are legally presumed innocent. Untried prisoners who are detained are considerably disadvantaged throughout the criminal justice process. Imprisonment before trial intensifies pressures to plead guilty, hampers accused persons' preparations for trial, and may affect how they are perceived in court. Several studies in different jurisdictions have shown that detained accused who plead not

guilty are less likely to be acquitted at trial than those who are not detained before trial; and that whatever the plea, they are much more likely to receive a prison sentence if convicted.

How should pre-trial imprisonment be decided?

Four key principles form the basis for limiting the use of imprisonment before trial:

- bail justices must exercise ***restraint***. Detention must be used only as a last resort;
- the decision must be ***fair***. This means that the accused must be given a full opportunity to challenge the state's position and that the decision must be made by unbiased officials, based on clear, known criteria;
- bail justices are ***accountable*** for the decisions they make regarding pre-trial imprisonment. The accused must have an opportunity to have mistakes that resulted in unjustified detention before trial corrected; and
- ***equality*** requires that all accused at risk of pre-trial imprisonment are treated the same.

What is the role of the police in pre-trial detention?

Detention before trial begins when the police exercise the power of arrest. Police may hold arrested individuals for up to 24 hours. By the end of this period, an arrested person must be either released or taken before a justice for a bail hearing.

In some cases, the police decision of whether to release or detain an accused before trial is dictated by law. For example, police have no authority to release a person charged with an offence for which the maximum penalty is more than five years imprisonment. Such an accused must have a bail hearing before a justice. All other legal detentions or imprisonment of accused people by police involve discretionary judgments based on predictions about how an accused person may behave if set free before trial.

The *Criminal Code* gives broad discretion to police in their decisions about detention before trial, but gives little guidance as to how this discretion should be exercised. It simply states that the police may detain an accused if the officer in charge has reasonable grounds to believe detention is necessary to ensure that the accused attends court or to promote the public interest in preventing crime or investigating the alleged offence.

Justices at bail hearings use similar criteria: ensuring attendance at court and protection of the public. But the *Criminal Code* explicitly requires them to focus separately on each justification for imprisonment and directs them to consider the reasons in sequence. Thus a justice deciding whether to imprison an untried accused must first hear evidence about the risk that the accused will fail to appear at trial and rule on this "primary ground." Only after the justice decides that the risk of flight is not significant enough to justify imprisonment does the "secondary ground." become relevant. At this point the focus shifts to any evidence that the accused is substantially likely to offend or interfere with justice before trial.

The *Criminal Code* gives general guidance to justices about the information they may consider when deciding whether to imprison untried accused. In addition, judges have developed case law that identifies other factors as relevant to decisions on pre-trial imprisonment. Rulings have established that evidence of an accused's "ties to the community" is highly significant to assessing the risk of flight (primary ground). Though community ties is a vague concept, it is generally

taken to include "residence, fixed place of abode, employment or occupation, marital and family status ... proximity of close friends and relatives, character witnesses and personal history."

With respect to the second ground — to prevent crimes or interference with the administration of justice — judges have mostly emphasized the accused's previous criminal history, if any, and the nature of the offence. Thus the time since the last offence (currency of record) may be a significant factor, as may previous violent offences or violence used in the incident that resulted in the charge.

What do the outcomes of pre-trial release and detention decisions show?

To investigate the exercise of discretion in the remand process, the Commission conducted a statistical study of imprisonment decisions for samples of black and white persons charged with any of five offence types: drug charges, sexual assaults, bail violations, serious non-sexual assault and robbery. The sample of 821 black adult males and 832 white adult males was drawn from Metro Toronto police files for 1989/90. Each offence category contains similar numbers and proportions of black and white accused persons. The details of our findings are shown in the following charts.

Figure 5-1 illustrates the basic findings for the entire sample. White accused (29%) were significantly more likely than black accused (18%) to be released by the police. Black accused (30%) were significantly more likely than white accused (23%) to be refused bail and imprisoned before their trials.

Figure 5-2a, which represents the entire drug charge sample, shows that, overall, white accused (60%) were twice as likely as black accused (30%) to be released by the police. Black accused (31%) were three times more likely to be refused bail and ordered detained than white accused (10%).

Figure 5-2b represents only that portion of the drug charge sample held for a bail hearing. It shows that 44% of these black accused, compared with 27% of the white accused, were refused bail and imprisoned before trial.

Figure 5-3 shows that over a third (37%) of white accused facing serious non-sexual assault charges were released by the police, but only a quarter (24%) of the black accused were released at that stage. Of those not released by the police, 84% of white accused, and 73% of black accused were granted bail at court. Because of the relatively small numbers, however, this difference was not statistically significant.

These findings are highly suggestive. But without more analysis, it would be premature to infer from them direct racial bias in release decisions. What appears to be a clear relationship between race and imprisonment could be masking other legally relevant differences between white and black accused. Findings of such other differences would not necessarily disprove that systemic racism influences pre-trial imprisonment decisions, but it would shift the focus of concern to potential sources of indirect bias in the remand process.

To look for other factors that might account for the racially unequal results, we analysed four characteristics across all offences:

- previous criminal history, including offence track record, currency of record and bail status;
- employment status;
- fixed address; and
- "marital" status.

We also looked more closely at the nature of the charges laid in the drug offence sample.

Figure 5-1: Release and imprisonment outcomes, by race, total sample

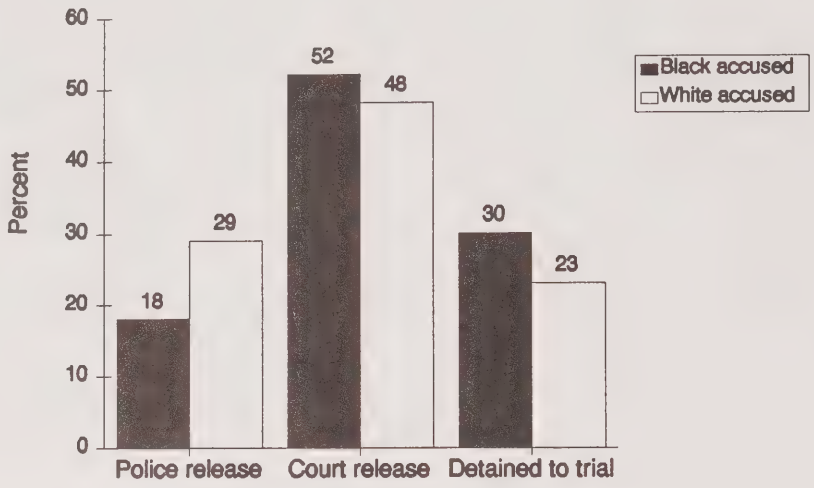


Figure 5-2a: Release and imprisonment outcomes, by race, drug charge sample

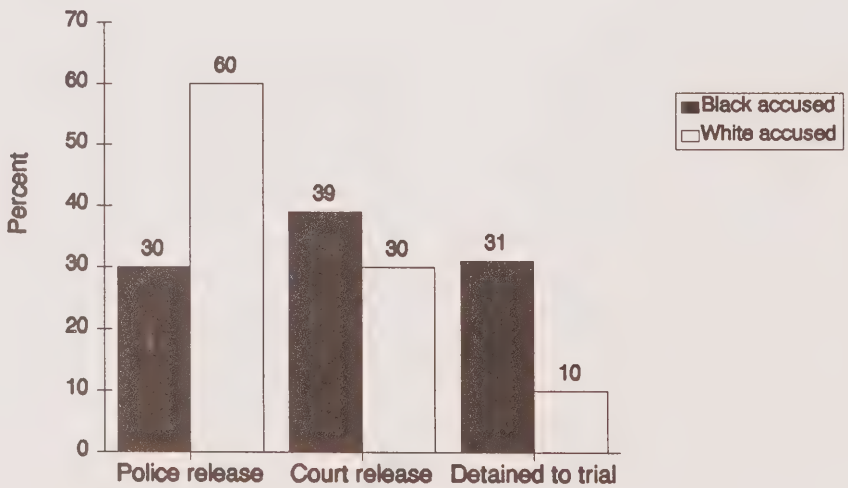


Figure 5-2b: Bail hearing outcomes, by race, drug charge sample

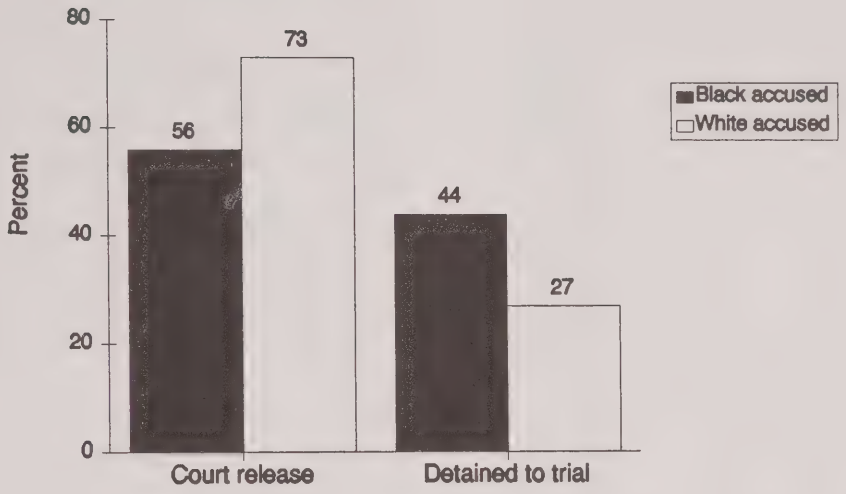
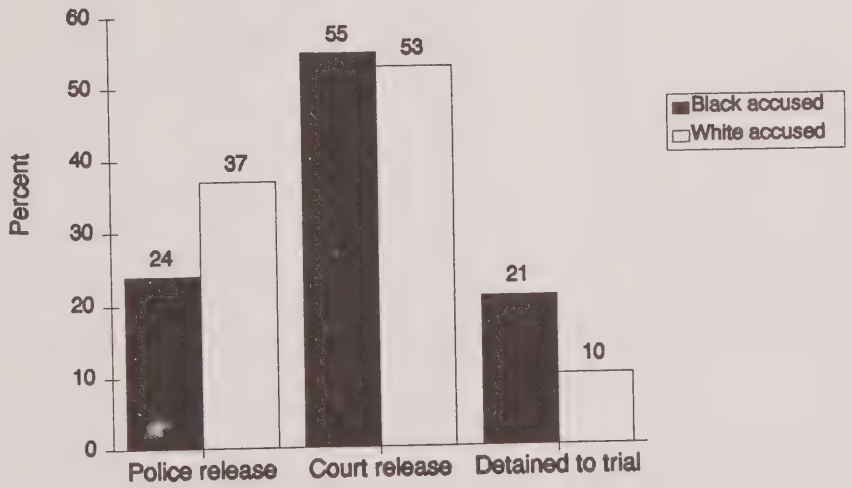


Figure 5-3: Release and imprisonment outcomes, by race, serious assault sample



Did the special case of drug charges cause the inequality?

Drug charges are special in that only some drug charges, such as simple possession, are governed by the same bail procedure as other criminal charges, in which the crown must "show cause" for imprisonment. Other drug charges such as trafficking, are "reverse onus" offences, which means that during the bail process the accused must "show cause" why he or she should not be imprisoned pending trial.

If a higher proportion of black accused in the sample were charged with a reverse onus drug offence, then some or all of the difference in outcomes might be due to the nature of the charge. Such a finding would not allay concerns about systemic racism, but might suggest that the main problem lies with the law that establishes reverse onus offences, or with charging decisions rather than release decisions.

A small supplementary study shows that among those charged with drug offences black accused (79%) were more likely than white accused (59%) to be charged with "reverse onus" offences.

However, the data in the major study do not suggest that differences in the nature of the charges laid caused the differential outcomes. Regardless of race, accused who were charged with a reverse onus offence were more likely to be detained pending trial than those who were charged with other offences. No statistically significant difference was found in the proportions of black and white accused who were recorded as charged with a reverse onus offence. This finding suggests that the differential outcomes were not due to differential charging.

What did we conclude?

This study of release decisions about white and black persons charged with the same offence types reveals evidence of differential treatment across the entire sample and significant differences for accused charged with drug offences and serious non-sexual assaults. Black accused were less likely than white accused to be released by the police and more likely to be detained after a bail hearing.

The differential is pronounced at the police stage of the process for the entire sample as well as for those charged with drug offences or serious non-sexual assaults. Consequently, the bail courts saw a significantly higher proportion of the total number of black accused than of the total number of white accused in these samples.

The courts granted bail to similar proportions of black and white accused who appeared before them, unless the accused were charged with drug offences. Within the drug offence category, white accused were more likely than black accused to be granted bail. This difference in imprisonment after bail hearings reflect two distinct processes. For the drug sample, differential decision-making by the police was added to at court, with the result that the difference in pre-trial imprisonment of black (31%) and white (10%) accused is particularly large.

For the entire sample and those charged with serious non-sexual assaults, differences in police decision-making affected the number of each group that appeared before the courts, but the courts then denied bail at similar rates to black and white accused. Because so many more of the black accused in the entire sample and those charged with serious non-sexual assaults were brought before the courts, however, the similar rate of denying bail resulted in larger proportions of all black accused being jailed before trial. In effect, because the courts generally granted bail at about the same rate for white and black accused, the decisions

simply transmitted the disparity created by earlier police decisions. Thus similar decision-making by courts, when applied to the results of differential decision-making by the police, produced systemic racism in imprisonment before trial.

Strikingly, the existence, extent or severity of a criminal record does not account for the findings of racial inequality in the use of imprisonment. Offence track record, currency of record, and bail status at the time of charge, on the other hand, likely contributed to racial difference in pre-trial imprisonment outcomes. But these factors do not explain all the difference.

Employment status, as described by the police, accounts for some of the racial inequality in imprisonment before trial, both for the sample as a whole and for the drug charge sample. But although it is clearly significant, employment status does not fully explain the findings of racial inequality. The other aspects of ties to the community that we examined – fixed address, and single status – also fail to account for what was found.

However closely we scrutinize the data, the findings disclose distinct and legally unjustifiable differences in release decisions for black and white accused, across the sample as a whole and for some specific offences in particular. The conclusion is inescapable: some black men imprisoned before trial would not have been jailed if they had been white, and some white men freed before their trials would have been detained had they been black.

Our findings do not reveal racial bias in the exercise of discretion for each offence type in the study. Instead, they show clear variations in release decisions within the range of offence types selected. This finding poses the question of the extent to which bail decisions about persons charged with other offence types would reveal racial bias in the exercise of discretion. The racial bias against black men documented in this study also raises questions about the treatment of accused from other racialized communities, as well as the treatment of black women and black youth. The answers to these questions lie in future research.

What should we do?

Two fundamental principles underlie the Commission's recommendations. The first is the principle of the rule of law requiring no greater intrusion on the liberty of any individual than can be strictly and legally justified by the state. The second is that the law must reflect equality not only in its content and administration but also in its consequences.

Arrest and police detention

As the Commission's major study demonstrates, police actions may contribute significantly to racial inequality in pre-trial imprisonment. Most obviously, the police make the critical decision about whether to arrest an accused person, and in most circumstances they also decide whether to release or detain the arrested person pending a bail hearing. In addition, the police prepare "show cause" reports that summarize information about the accused and the alleged offences. Crown attorneys generally use these reports when deciding if the state should seek the imprisonment of an accused, and when making submissions to a justice at a bail hearing.

Exercise of the arrest power is highly discretionary and, except when the police obtain prior authorization in the form of a warrant, it is difficult to scrutinize. The arrest provisions of the *Criminal Code* are intended to limit the use of this highly coercive police power and to promote alternative methods of launching criminal proceedings. The Code,

however, provides little guidance as to how police should exercise their discretion.

The Commission's findings demonstrate that without adequate guidance and direction on exercising discretion, police detention decisions may too easily fail to conform to the principle of equality. There is an obvious need for comprehensive and consistent guidelines.

5.1 The Commission recommends that:

a) the Ministry of the Solicitor General and Correctional Services, in consultation with interested community organizations, lawyers, police services and police associations, develop operating guidelines based on the principle of restraint in exercising powers to detain arrested persons and to impose conduct restrictions upon release. The guidelines should be made public.

b) police officer training materials and programs be modified and standardized to reflect the principle of restraint in exercising the arrest power and the duty to release arrested persons.

c) the Ministry of the Solicitor General and Correctional Services monitor operating guidelines and training programs to ensure that all materials on police detention and release reflect the principle of restraint embodied in the *Criminal Code*.

Police use of the arrest power, like so much of their street-level discretion, is difficult to control without an effective monitoring system.

5.2 The Commission recommends that:

a) upon arrival at a police station with a detained person, an arresting officer be required to complete a form explaining why the accused has not been released. The form should be counter-signed by the officer in charge.

b) an officer in charge who decides not to release the accused be required to record an explanation of the decision on the form used by the arresting officer. The officer in charge should also be required to explain the reason for detention to the accused and provide an opportunity to respond. Any response by an accused should be recorded on the same form as the reasons given by the police officers.

c) crown attorneys at the bail hearing be required to disclose to defence or duty counsel the written police explanations for using arrest and detention powers, as well as the response, if any, of the accused.

d) police explanations for detention and responses of accused persons be videotaped whenever possible. The existence of such a videotape should be disclosed in writing to crown counsel at the bail hearing, who in turn should be required to disclose it to duty or defence counsel.

Conditional release by the police

One reason the police have traditionally given for failing to release arrested persons is that they wanted to impose enforceable conditions on the accused but did not have the power to do so. Parliament responded to these concerns by granting the police discretion, as of April 1, 1995, to release accused persons subject to certain restrictions including:

- remain within a specified territorial jurisdiction;
- notify police of change of address, employment or occupation;
- abstain from communicating with named parties or going to certain addresses; and
- deposit passport.

Since the police power to impose release conditions came into effect late in the Commission's mandate, we were unable to evaluate its impact. Given our other findings about police discretion, however, we are concerned that this new power be exercised with restraint.

5.3 The Commission recommends that:
a) upon deciding to impose conditions on the release of an accused, the officer in charge be required to complete a form explaining why each condition is deemed necessary.
b) an officer in charge who imposes conditions on the release of an accused be required to explain why and provide an opportunity for the accused to object. Any objection by an accused person should be recorded on the same form as the reasons given by the officer in charge.
c) any accused subject to police-imposed conditions be given a copy of the form explaining the reasons for each condition.

If this protection is to be effective, the accused has to be aware of the right to apply for a variation, and adequate legal advice and representation is required.

5.4 The Commission recommends that:
a) release documents issued by the police contain printed advice that an accused may apply to be relieved of release conditions on any appearance in court.
b) duty counsel adopt the routine practice of asking accused persons whether they are aware of the right to apply to be relieved of release conditions imposed by the police. If requested by an accused person, duty counsel should assist in applying for relief.

"Show cause" reports

A "show cause" report is a written synopsis of the case and the background of the accused. Police prepare these reports to help crown attorneys decide whether to seek imprisonment of the accused or request conduct restrictions upon release.

Police officers sometimes use their total control over the content of show cause reports to comment on accused persons in a variety of irrelevant, sometimes racialized, ways. Our research shows, for example, that the police frequently record judgments about whether an accused is unco-operative or otherwise shows a "bad attitude" towards the police. Of particular concern is what appears to be a routine practice in some jurisdictions of recording and commenting on the accused's immigration history and status or country of origin.

Racialization of accused people in show cause reports, and other unprofessional commentary about the accused, indicate a clear need for more guidance to police officers about the purpose and appropriate content of these reports.

5.5 The Commission recommends that:
a) the Ministry of the Solicitor General and Correctional Services, in

consultation with interested community organizations, lawyers, police services and police associations, develop a checklist of information about an accused person relevant to show cause reports.
b) crown attorneys request the police to explain in writing the relevance of any reference to an accused person's immigration status, nationality, race, ethnicity, religion, place of origin or birth that is contained in a show cause report.

Our research also disclosed a specific problem with police sources of information that may harm refugee claimants from certain countries. Police officers usually obtain information about immigration status from the Canadian Police Information Centre (CPIC, a computer system shared by the police and other law enforcement agencies) or Citizenship and Immigration Canada. Since the police are not generally trained on the complexities of Canada's immigration regime, they may simply accept and transmit what they learn from these sources.

Sometimes, however, the information recorded on CPIC or provided by an immigration official does not give a true picture of a person's status. For example, all refugee claimants whose claims are denied are technically subject to deportation, and official immigration information may describe them as under a removal order. But, as a matter of policy, Canada does not generally deport individuals to some countries. This difference in information is potentially a source of considerable confusion, and may result in unjust imprisonment before trial.

5.6 The Commission recommends that police not refer to an accused person as being under a removal order in show cause reports without verifying that Citizenship and Immigration Canada intends to remove the person from Canada.

Preparation for bail hearings

Many prisoners are wholly unprepared for their first bail hearing. Such unprepared prisoners tax the already overstressed duty counsel system. If large numbers of unprepared prisoners arrive at the same time, duty counsel may be unable even to interview them properly, still less to provide full advice or verify information about sureties, employment or residence. One consequence may be postponement of the bail hearing to obtain further information. Another is that bail conditions may be imposed that are beyond the financial means of the accused. In either event, the accused must be held in custody until a subsequent court appearance.

The problem could be alleviated if properly trained and supervised paralegals assisted accused persons prior to the initial interview with duty or defence counsel. The paralegal could then inform defence or duty counsel to facilitate the bail interview with the accused.

5.7 The Commission recommends that:
a) the Ontario Legal Aid Plan establish the position of "bail interview officer" to assist persons detained by the police to prepare for bail hearings.
b) legal aid area directors work together with members of the local bar, crown attorneys and representatives of interested community organizations to establish a training program for bail interview officers. The program should include work-

ing with interpreters and interviewing skills, as well as information on the bail system and anti-racism.
c) legal aid area directors establish co-operation protocols with local police services to secure access to police holding cells for bail interview officers and to arrange for interviews to be conducted in private.

A more systemic solution to the problem of unprepared accused may be possible in densely populated urban areas: to extend the operating hours of bail courts. A pilot project for an expanded bail court has been proposed for the Metropolitan Toronto area. The present plan is for bail justices to be available 20 hours a day to deal with uncontested bail matters, but there is no provision for duty counsel or crown counsel staffing, at least during the start-up phase. We believe that the expanded bail court could reduce unjust and costly remands into custody and should be fully supported.

Judicial Detention

The principles governing judicial detention are established in the *Criminal Code*, which gives crown counsel, and bail justices, crucial discretionary powers. The availability of alternatives to imprisonment may also have a significant influence.

Bail rules: the reverse onus exceptions

The law generally presumes that an accused person will be released on bail and requires crown attorneys to "show cause" for release to be denied.

Various "reverse onus" exceptions to the presumption of release deviate from the commitment to restraint in the use of imprisonment. In these situations, the law presumes that the accused will be imprisoned before trial unless they "show cause" for release.

The Commission's research suggests that in practice, the "reverse onus" requirement for charges laid under the *Narcotic Control Act* may be contributing significantly to disproportionate imprisonment of untried black accused. The "reverse onus" provisions have not stemmed the supply of illegal drugs to Canadians. Most people charged with trafficking are petty "street traders" Because such people are easily replaced by those who control drug supplies, imprisonment of minor dealers and couriers has a negligible impact on the availability of illegal drugs to users.

In a decision released shortly before the Commission was established, the Supreme Court of Canada reviewed the constitutional justification for the "reverse onus" in charges under the *Narcotic Control Act*. Unfortunately, the majority decision accepts the conventional rationale, the "war on drugs," for departing from the principle of restraint in these cases.

The Commission submits, however, that fairness and racial equality in the Ontario criminal justice system would undoubtedly be enhanced if Canadian law were to apply the standard presumption of release to persons charged with trafficking and importing offences under the *Narcotic Control Act*. We are confident that making the presumption of release the standard would make little difference to bail hearings of persons charged with trafficking in or importing substantial quantities of drugs. In such cases, crown counsel should not find it difficult to argue for detention if that is deemed necessary.

5.8 The Commission recommends that the Government of Ontario propose to the Government of Canada that it repeal the reverse onus provision of the *Criminal Code* for

importing, trafficking and related charges under the *Narcotic Control Act*.

Crown counsel discretion

The *Criminal Code* assigns crown attorneys considerable responsibility over pre-trial imprisonment. For the vast majority of charges, which are subject to the standard presumption of release, the Code authorizes crown attorneys to set the parameters for the justice's decision. Crown attorneys have the primary say concerning: whether an accused person may be released on consent; what reasons for detention are presented to a bail justice; and the extent of guarantees and conduct restrictions a justice is likely to impose as a condition of release.

The procedures governing Ontario crown attorneys at bail hearings are set out in the comprehensive *Crown Policy Manual*. We identified three types of problems with the bail procedures in the *Manual*. First, it unduly emphasizes immigration status as a significant measure of "ties to the community." Second, it fails to alert crown attorneys to the risks of inadvertent racial discrimination arising from considering factors such as employment history in bail submissions. Third, it generally lacks direction on crown attorneys' responsibility to reduce the risk of unfair detention.

The Commission also identified four areas in which crown attorney leadership could significantly reduce the risk of racialized persons being unjustly imprisoned before trial.

The first concerns apparent confusion about whether refugee claimants should be considered ordinarily resident in Canada, and so subject to a reverse onus presumption if charged with an indictable offence. Treating refugee claimants as not ordinarily resident may contribute to unjust imprisonment before trial for racialized accused. Crown attorneys should show leadership by assuming the responsibility of "showing cause" for such an accused. This position should be incorporated into the *Crown Policy Manual*.

The second concerns the risk of unfair detention when release is conditional on financial guarantees that the accused is unable to meet. Crown attorneys have a large role in making sure that bail is not set so high that the accused remains in custody. Changes to the provincial administration of the bail system would also reduce the risk of persons being detained because of inappropriate surety bails. Much would be achieved by implementing our earlier recommendations to improve accused persons' preparation for bail hearings.

Third is leadership to prevent unnecessary and overly intrusive conduct restrictions on accused persons who are released. Through our consultations and submissions we were told repeatedly of large numbers of restrictions, many of which were said to be unnecessary, being imposed on black and other racialized accused. Leadership of crown attorneys is fundamental to just conduct restrictions. Crown attorneys ought to request bail conditions only to the extent necessary to secure attendance at court or to prevent commission of an offence or interference with justice before trial.

Fourth is ensuring that bail orders are promptly varied if they contain unattainable financial guarantees or unnecessary conduct restrictions. Applications for variation may be processed in provincial courts, with the consent of crown counsel, or by requesting the General Division of the Ontario Court of Justice to review a bail order formally. In practice, however, the volume of work in many provincial courts has meant that busy crown attorneys may refuse to consider applications on the day they are made. Crown attorneys should treat applications to vary bail

orders as a high priority.

5.9 The Commission recommends that the *Crown Policy Manual's* provision regarding bail be amended to:
a) eliminate general and irrelevant references to immigration or citizenship status.
b) warn of the potential for inadvertent discrimination inherent in relying on such factors as residence and employment history to predict whether an accused person will appear in court.
c) warn crown attorneys that evidence relating to the accused's "roots in the community" generally should not be used to seek detention on the secondary ground.
d) direct crown attorneys to treat refugee claimants as ordinarily resident for the purposes of bail hearings.
e) require crown attorneys to ensure that an accused person is not unnecessarily detained because a surety bail is set too high.
f) require crown attorneys to ensure that conditions placed upon release are directly and substantially related only to securing the accused's attendance in court or to preventing the commission of offences or interference with the administration of justice while on bail. Unnecessary and intrusive conditions such as "carry bail papers" should be avoided.
g) direct crown counsel that expeditious processing of bail variation applications in provincial division courts be a high priority.

Bail justices' discretion

Bail justices decide whether or not accused persons should be imprisoned before trial, and whether to require financial guarantees or conduct restrictions of an accused who is freed. Commission findings show that black accused do not benefit from the exercise of this discretion to the same extent as white accused. Part of the problem may be due to the information presented to justices; another likely factor is how justices assess risk.

As judicial officers, bail justices are formally independent of government bodies such as the Ministry of the Attorney General. Consequently they are not subject to government guidelines and procedures such as those we propose for crown attorneys. Increasingly, however, judges and justices of the peace undertake education and training programs. Education and training programs should include findings from research into reliable indicators of risk, potential discrimination in pecuniary release conditions and any specific difficulties that may arise from certain conduct restrictions.

5.10 The Commission recommends that education for justices of the peace and judges regarding bail include training to:
a) avoid assumptions that may subtly discriminate against racialized persons.
b) avoid discriminatory application of criteria related to community ties.
c) assess occupation, place of residence and cultural background of accused persons to ensure that financial release conditions do not impose needlessly onerous burdens.
d) ensure that conduct restrictions imposed upon release do not interfere with the lives of accused per-

sons any more than is strictly required.

Objective indicators of risk

The exercise of discretion at bail hearings centres on predicting how an accused person would behave if released. While apparently "objective" predictive tools may have potential to reduce unjust imprisonment before trial, they must be designed and used with caution. Predictive factors should be well defined, but capable of being flexibly applied to persons who do not fit into standard categories. Specialized training on the limitations as well as the appropriate uses and interpretation of risk profiles would be essential.

The Commission strongly favours development of race-neutral indicators of successful pre-trial release, but immediately applying such indicators as a risk-profile instrument, decision-making presumptions and principles, broad guidelines or any other form would be premature. Far more important at present is fundamental empirical research on existing court practices and comparative research on alternatives. The research should be widely distributed and used in education and training programs for judges, justices of the peace, crown and defence counsel.

5.11 The Commission recommends that the Ministries of the Solicitor General and Correctional Services and the Attorney General sponsor research into empirically based indicators to assist the courts in deciding whether to grant pre-trial release.

Bail supervision programs

Bail supervision programs are community-based services that monitor untried accused persons. Their general goals are to: provide an alternative to detention of accused persons before trial; promote the accused's compliance with bail conditions and attendance at court through supervision and notification of court dates; and decrease possible re-arrests and increase the client's ability to use community services effectively.

A nagging worry about bail supervision programs is that they may "widen the net" if they are used for persons who would otherwise be released subject only to conduct restrictions. Thus instead of promoting restraint within the bail system, supervision programs may inadvertently result in increased control over accused persons awaiting trial. Concerns about costly and wasteful duplication of supervisory services have also been raised. A recent review of Ontario bail programs shows, for example, that more than one in three bail supervision clients was already reporting to the police or the provincial probation service at the time of entering the bail supervision program.

Nevertheless the Commission believes that bail supervision can contribute to restraint in the use of imprisonment. Even if bail supervision does no more than limit further growth in remand populations, it is still performing a valuable function. The Commission believes that bail supervision programs should be guaranteed secure funding to enable them to improve their capacity to serve members of racialized and linguistic minority communities.

5.12 The Commission recommends that:

a) the Government of Ontario guarantee funding for existing bail programs and increase the number of bail programs to ensure adequate supervision services in all urban centres.

b) bail programs be funded to assist racial and linguistic minority communities and, in concert with interested individuals and community groups, develop culturally inclusive bail supervision.
c) bail programs be funded to retain interpretation services.
d) responsibility for bail programs be transferred from to the Ministry of the Attorney General and include supervision of persons awaiting disposition of immigration and refugee hearings.
e) the Ministry of Community and Social Services, in concert with existing bail programs and interested community organizations, consider the feasibility of a bail supervision program for youths aged 12 to 15.

Access to interpreters

Consultations, surveys and submissions revealed persistent and serious concerns that accused from racialized communities are being detained because essential interpreter services are inadequate or unavailable.

Within a few minutes of first seeing the accused, an interpreter is expected to verify a common language or dialect, assess the accused's vocabulary or level of understanding in the language, explain the purpose of a bail hearing, describe what is going to happen in the courtroom and obtain information for defence or duty counsel. Many spoke of accused persons being needlessly imprisoned because interpreters are given too little time to perform these complex tasks adequately.

To prevent unjust imprisonment before trial of accused persons from linguistic minority communities, access to interpreter services must be greatly improved. Of specific concern to bail courts are timely notification of the need for interpretation services and access to such services outside the courtroom to help defence or duty counsel communicate with linguistic minority accused. A more effective approach is for court administrators to obtain this information from bail interview officers, the police, or crown attorneys early enough to arrange for the necessary services.

Within the courthouse, interpretation services should be available whenever duty or defence counsel or a crown attorney may need to speak with a linguistic minority accused. Personal attendance of an interpreter in these situations should be provided whenever possible. If an interpreter cannot arrive in time to prevent unjust detention, however, interpretation services should be provided through three-way telephone communication.

5.13 The Commission recommends that:
a) under the supervision of the local administrative judge, court administrators develop procedures to ensure early notification of the impending arrival of a linguistic minority accused for a bail hearing.
b) wherever possible, interpreters be available to assist counsel and crown attorneys communicate with an accused person outside the bail hearing. If an interpreter cannot personally attend, telephone access to an interpreter should be available.

Representation at bail hearings

Commission findings demonstrate that lack of restraint in the use of detention before trial particularly affects black and other racialized accused. Limitations in legal services at bail may have contributed significantly to the

problem. Even before the recent crisis in legal aid funding, legal aid fees for bail hearings were low and declining. That meant much of this work has been done by young and inexperienced lawyers.

Since a committee to review and restructure the Legal Aid Plan was established by the Law Society of Upper Canada and the Ontario Government during the final weeks of our mandate, we have refrained from making specific recommendations based on the current system. Whatever changes are made, however, high-quality legal representation must be provided at bail.

6

Charge Management

Charge management deals with decisions throughout the criminal justice system including decisions about:

- laying and reviewing charges;
- diversion of charges away from court proceedings;
- procedures for resolving issues before charges are tried, plea-negotiations; and
- criminal justice services for accused persons, victims and witnesses.

Discretion is the essence of charge management, starting with the police deciding whether an incident warrants a response from the criminal justice system to crown attorneys deciding whether and how to prosecute.

Victims, witnesses, and accused persons must all deal with charge management procedures during the early stages of the criminal justice process. The number of individuals who later become involved in trial proceedings, however, is much smaller, and even fewer accused are exposed to punishment systems. Any shortcomings in charge management at the early stages may not only spread perceptions of injustice throughout the criminal justice system but may also produce unjust results.

There are two main concerns about systemic racism in charge management practices. The first is failure to exercise discretion in favour of racialized people as frequently or as significantly as for white people. During the early stages of criminal proceedings, police, crown attorney and defence counsel decisions are often made rapidly, based on limited information and hidden from public scrutiny. Racialized assumptions and stereotypes may influence decisions in various ways, some quite subtle.

The second problem is that any failure of criminal justice officials to communicate adequately with racialized people involved in criminal management procedures may create or exacerbate perceptions of exclusion from justice. The Commission received numerous complaints about police officers, lawyers or judges making important decisions without fully communicating what is happening to

persons most affected by the decisions. Lack of communication may be perceived not only as disrespectful but also as deliberate bias.

How are charges selected and processed?

The criminal justice system's procedure for selecting incidents that will be subject to its proceedings has two stages. The first is the decision to lay charges, which is usually made by the police and which must be approved by a justice of the peace. At the second stage, a crown attorney reviews the charges to determine which, if any, should proceed.

Once the charges are settled, crown counsel may have further administrative choices, such as the election to proceed by indictment or summarily or the option of using a diversion program rather than proceeding to trial.

Police discretion to lay charges

The police have considerable discretion over whether and what charges to lay. Though officers are free to consider the wishes of victims or lawyers' opinions, they are not bound by them. In order to lay a charge an officer must have "reasonable and probable grounds" to believe that the suspect has committed an offence. Even once this threshold is met, police officers still have discretion over whether to lay charges and, if so, which charge(s).

There are policies, however, by which police officers cannot exercise discretion once they believe reasonable and probable grounds exist, such as assaults within family settings. Such policies significantly curtail police discretion in the charging system, but they have not eliminated it. Even in these instances police officers must decide whether reasonable and probable grounds exist.

Findings about police charging discretion

Many Ontarians do not believe that police always exercise their charging discretion fairly. It is alleged that police officers are quick to charge racialized persons while they would not charge white persons in similar circumstances, and that charges against racialized persons tend to be more severe or more numerous than warranted. We also received several reports of incidents that were provoked or exacerbated by harsh police treatment and that resulted in charges against a racialized person.

Ontario police services appear to be seriously attempting to improve relationships with black and other racialized communities, largely by implementing community policing practices. Unless a commitment to racial equality is part and parcel of charging practices, however, such efforts may do little to alleviate existing suspicion.

One response to our findings might be to reduce police discretion over charging decisions. This could be achieved by: decriminalizing or reducing the enforcement priority given to offences such as possession of a narcotic; developing and enforcing specific guidelines to govern police action; and increasing the skills of justices of the peace to question police officers before allowing charges to proceed further. The risk would remain, however, that individual officers might ignore or manipulate procedural changes to achieve charging objectives.

Another approach might be to maintain police discretion but provide officers with alternatives to criminal charges, such as formal procedures for diverting persons from criminal proceedings. While such procedures are common in other jurisdictions, they do not exist for police in Ontario.

In Britain government policy promotes

cautioning, especially of young persons, and establishes simple criteria for determining whether an individual qualifies for a caution.

A more proactive version of police cautioning is the "enhanced cautioning" or "family conferencing" model adopted by a police service in New South Wales, Australia. The police convene a meeting of the young person and his or her extended family and friends as well as, if possible, the victim and his or her supporters. The meeting is facilitated by a trained and experienced officer. Towards the end of the meeting the group develops a plan through which the young person may redress the harm caused. The New South Wales cautioning model could address many of the concerns of black and other racialized Ontarians about police charging discretion, especially in dealings with youths.

Any cautioning regime introduced in Ontario would need to protect against the risk that racialized judgments might influence police selection decisions. Equally important is the need to guard against "net-widening" by ensuring that the powers are used to reduce the number of persons formally charged, and not to draw more people into the system.

6.1 The Commission recommends that:
a) the Ministry of the Solicitor General and Correctional Services establish provincial guidelines for a formal police cautioning system.
b) the guidelines require police officers to use the cautioning power instead of charges unless the need for charges is justified in writing.
c) the use of the cautioning power and its relationship to charging practices be monitored for evidence of "net-widening" and racial bias.

6.2 The Commission recommends that:
a) the Ministries of the Solicitor General and Correctional Services and the Attorney General develop general criteria for Ontario police services to establish enhanced cautioning systems that include community accountability conferences.
b) Ontario police services, in concert with interested community organizations and individuals, establish enhanced cautioning systems that include community accountability conferences.
c) the Ministry of the Solicitor General and Correctional Services provide start-up and training funds for enhanced cautioning systems.
d) enhanced cautioning systems be monitored for recidivism rates and satisfaction with the process, and for evidence of "net-widening" and racial bias.

Crown attorney discretion to review charges

In the second stage of the charge selection process crown attorneys have discretion, independent of the police, to decide if charges should proceed. The exercise of this discretion by Ontario crown attorneys is subject to comprehensive and publicly available guidelines.

Crown attorneys may have further discretion, depending on the charge, of proceeding either by indictment or summarily. When the crown proceeds by indictment, the maximum sentence available upon conviction is much greater. In practice, the sentences actually imposed tend to be greater when the crown proceeds by indictment.

Findings about the review of charges

Some defence and duty counsel suggested that the working relationship between crown attorneys and police officers may lead to failure to review charges adequately or to scrutinize fully the evidence on which racialized persons are charged. Consequently the risk may be significant that the exercise of discretion transmits bias against black and other racialized persons into the next stage of the criminal justice process.

Our research into prosecutorial discretion suggests some problems in the extent to which crown attorneys rely on documentation prepared for them by the police. A comparison of the outcomes of crown elections to proceed summarily or by indictment in some offences in our major study shows small but statistically significant differences favouring white accused across the entire sample of offences, and for those charged with assaulting a peace officer and the hybrid drug offences. No statistically significant difference appears in the choice of prosecution procedure for those charged with sexual assault or bail violations.

It is striking that racial differences appear for two highly discretionary charges that are usually initiated by the police and have been strongly linked to racialized stereotypes about the supposed criminality of black people. Heavy reliance on information presented by police exposes crown attorneys to the risk that their decisions may inadvertently incorporate transmitted bias.

Another concern is the large caseloads of many crown attorneys, which promote rapid decision-making that is vulnerable to the influence of stereotypes such as "unsettled" lifestyles, "notorious" residential areas, and "cultural propensities to crime." Crown attorneys may find it helpful to be alerted to specific ways of avoiding the influence of racialization on the exercise of prosecutorial discretion. The present *Crown Policy Manual* provides only general guidance through its introductory statement about avoiding discriminatory stereotypes influencing decision-making.

> **6.3 The Commission recommends that the Ministry of the Attorney General establish a committee that includes crown attorneys and other Ministry officials, defence counsel, and representatives from racialized and other communities to advise on revisions to the *Crown Policy Manual*.**

Discretion to avoid court proceedings

In some circumstances crown attorneys have discretion to dispose of charges without a trial by entering the accused into a diversion program. The most extensive diversion program in Ontario is the Alternative Measures Program, established under the *Young Offenders Act,* for youths aged 12 to 17.

Crown discretion over diversion programs, however, is limited. Diversion programs are restricted to persons who admit responsibility for the incident that led to the charge, and certain offences are excluded. Crown attorneys are responsible for determining whether candidates for diversion have met the conditions for admission into the program. Depending on the program and the offence, these decisions may be straightforward or may require complex judgments.

Once a crown attorney has approved a young person for the Alternative Measures program, discretion temporarily passes to a community-based agency involved in the program. Such agencies supervise persons referred to them much like probation offices do for convicted persons. Their particular task is to formulate suitable rehabilitative measures

for their clients, which may include counselling or therapy. The agencies monitor the performance of the stipulated measures.

A supervising agency is obligated to notify the crown attorneys' office as to whether the youth has completed the measures satisfactorily. Then the crown attorney must decide whether the charges against the youth should be stayed. If the youth has co-operated with the agency and fully completed the stipulated program, the decision is straightforward. The decision is more difficult when the agency reports partial or non-performance, especially if the young person maintains that the measures required were overly burdensome or otherwise unfair.

The Commission found no evidence that crown attorneys select youths for Alternative Measures in a racially biased manner. However, inadequate access to Alternative Measures and low participation rates for racialized youths were noted frequently.

Our review of existing policies raises an important systemic issue: the exclusion of all drug charges from Alternative Measures. The massive over-representation of black people among persons imprisoned for drug charges suggests that this exclusion adversely affects black youths to a significant extent.

Primary responsibility for this problem lies with the federal government whose agents prosecute drug charges in Ontario. The federal government does not have a systematic youth diversion program. If diversion of drug offences is to remain excluded from the provincial Alternative Measures program, Ontario should attempt to persuade the federal government to develop a separate diversion program.

6.4 The Commission recommends that the Ministry of the Attorney General establish a protocol with the Federal Department of Justice to allow young persons charged with drug offences to be diverted from the criminal process and be into the Alternative Measures Program.

Access to legal services for accused persons

Access to legal services for accused persons is among the most pressing issues for the Ontario criminal justice system. Many people depend on the Ontario Legal Aid Plan to fund some or all of the legal services they need. Late in the Commission's mandate a crisis in legal aid funding erupted publicly. Even before the crisis, however, the Commission found serious concerns among racialized Ontarians about legal aid services. Lack of information about legal aid, for example, is a particular concern among linguistic minority communities.

We recommend enhancing access to legal services that appear to be most needed by racialized accused persons. However the current legal aid crisis is eventually resolved, black and other racialized persons should face no greater barriers than other Ontarians in obtaining legal services from the criminal justice system.

Access to emergency legal services

In order to obtain emergency legal services, persons held in police custody must know their rights. The *Canadian Charter of Rights and Freedoms* gives arrested persons the right to speak with a lawyer and the right to be informed of this entitlement.

Effective communication is critical for an accused person to understand legal rights and legal advice. Police services in urban Ontario draw on a variety of interpreters including multilingual police officers and civilian employees, court interpreters, community volun-

teers, and friends or relatives of accused persons. Twenty-four hour telephone interpreter services are also available in some places.

Superficially, this array of services may seem adequate. In practice, however, most police services give officers little or no guidance on when to use an interpreter or how to communicate effectively through an interpreter. The fundamental right to speak with a lawyer means little unless information about it is communicated in a language the accused person understands. Police officers should make every effort to identify the most appropriate language in each case and to convey the formal caution in it.

6.5 The Commission recommends that the Ministry of the Solicitor General and Correctional Services:
a) translate the formal caution given to a suspect on detention or arrest into the principal languages spoken in various Ontario police jurisdictions.
b) direct police services to provide this caution to suspects in the appropriate languages before questioning them.

6.6 The Commission recommends that police personnel receive training about the dangers of assuming competence in English when an arrested or detained person from a linguistic minority community has a surface grasp of English.

An arrested or detained person who needs an interpreter to understand the right to obtain legal advice while in police custody also needs such assistance to communicate with the lawyer. The right to legal services assumes that lawyer-client communications are and are perceived to be private and privileged. Thus, this service should be provided by an interpreter who is independent of the police.

6.7 The Commission recommends that the Ontario Legal Aid Plan be funded to establish three-way telephone communications to allow accused persons from linguistic minority communities who are in custody to speak with duty counsel through an interpreter.

Access to basic legal advice

Many racialized accused may be unable to make informed choices about available options, such as diversion programs or plea resolutions, because they do not understand what is being offered or the implications of their decisions. Though some participants in our consultations emphasized the plight of linguistic minority accused persons, most insisted that those whose first language is English also need more information and advice than is currently available.

Services currently offered by the Ontario Legal Aid plan could be expanded to improve accused persons' access to basic legal advice and thereby build confidence in the charging system.

6.8 The Commission recommends that:
a) the Ministry of the Attorney General allocate additional funding to enable the Ontario Legal Aid Plan to have a duty counsel available to give advice in multi-court facilities. Such "advice duty counsel" would not generally appear in court, but would be available in private offices in or near the court house to pro-

vide immediate advice to accused persons, their supporters and family members.
b) the Ministry of the Attorney General make provision to expand duty counsel clinics in response to changing community needs, after broad consultation and subject to review.
c) where "advice duty counsel" or duty counsel clinics are not available, Legal Aid area directors publicize the availability of and issue legal advice certificates to accused persons and their families or supporters who request legal advice in criminal matters.

Access to legal representation

The Commission found that many applicants from black and other racialized communities are confused or badly informed about important aspects of the Legal Aid Plan, such as the location of offices and the relationship between the plan and obtaining a lawyer's services. We received complaints that legal aid staff appear unaware that extended familial relationships are common in many racialized communities. Many applicants reported that questioning of their precise financial responsibilities for dependent relatives was insensitive and intrusive.

Three general patterns appeared through the Commissions research on the Legal Aid applications process. First, some applicants clearly required interpreter services. Since Legal Aid does not usually provide interpreters and these applicants typically could not afford professional interpreters, they tended to rely on family or friends. Sometimes legal aid staff had difficulty communicating with such an interpreter. Even when communication appeared effective, however, this solution was quite unsatisfactory given the sensitive nature of the questions.

Second, some applicants with functional English were obviously unfamiliar with the vocabulary used in the interview. Often the applicant attempted to struggle through the process, and tried to be co-operative by answering "yes" whenever possible. But communication can still be ineffective.

The third pattern involved English-speaking applicants whose accents or dialects were unfamiliar to the interviewing officers. These applicants were frequently asked to repeat their answers, often several times for each question. Though interviewers obviously did not intend to be harsh or disrespectful, these interviews often resembled interrogations.

6.9 The Commission recommends that the Ontario Legal Aid Plan:
a) make linguistic and cultural interpretation services available during application interviews.
b) prepare and widely distribute brochures and videos in the principal languages served by each area office that explain the range of services available through the plan, and the purpose and likely content of interviews to be conducted by staff.

Once an applicant obtains a legal aid certificate, the next step is to find a lawyer. All Legal Aid offices maintain a list of lawyers who accept certificates, and the list indicates if a lawyer speaks a language other than English. The Legal Aid office provides no additional details about factors that matter to many applicants. Black and other racialized accused persons may be particularly anxious to find lawyers who accept and understand the problems of living in a racialized society. Sometimes this concern is expressed as a

preference for a lawyer of the same racial origin. More often, however, black and other racialized accused persons simply wish to hire a lawyer, of any racial origin, who understands racism.

How to refer to such lawyers is by no means a simple task, and the Legal Aid Plan's capacity to address this problem effectively is limited. Useful initiatives could probably be developed by community-based agencies, which could maintain their own referral lists and informally share information with those persons who need a lawyer.

The Ontario Legal Aid Plan could help, however, by being mindful of the experience of racism when racialized clients apply to change their lawyers. At present, because a change in lawyers may be expensive, it is difficult and permitted only in exceptional circumstances.

6.10 The Commission recommends that the Ontario Legal Aid Plan direct area directors to take a flexible approach to requests for a change of lawyer if the client maintains that racism has caused the relationship with the lawyer to break down.

Pre-trial resolution — plea bargaining

Crown attorneys have discretion to reach agreements with defence counsel about how some matters arising from charges will be presented to a judge. In return for the accused's willingness to admit guilt in court on at least one charge, a crown attorney may, for example, agree to withdraw other charges against the accused or a co-accused, accept not guilty pleas to other charges, or propose a less severe sentence than the accused is likely to receive if convicted after a trial.

Deep distrust of the system of resolution agreements, or plea bargaining as it is commonly known, was among the most recurrent themes of the Commission's public consultations. The Ontario criminal justice system, however, is fully committed to the plea resolution process. The problem remains that accused persons excluded from the discussions may be highly suspicious of "deals" struck on their behalf. To many black and other racialized accused, such exclusion is one more reason to believe that the criminal justice system is attempting to hide their mistreatment.

Three aspects of the resolution system are of particular concern. The first concerns unrepresented accused who may be offered a plea resolution. These accused may have little understanding of the case against them or how the evidence may affect a resolution proposal. Without full comprehension of the crown's case, unrepresented accused are severely disadvantaged.

The second problem is the exclusion of accused persons from resolution discussions, especially the pre-trial conference where the deal is provisionally finalized. Many accused persons feel their lawyers attempt to "sell" the terms of an agreement that was drawn up without them. They complain that they do not know what transpired during negotiations, and feel they have little choice but to agree.

Third, serious concerns persist that accused persons have not always understood the nature or implications of a resolution agreement they are asked to accept. Such incomprehension has been widely reported by and on behalf of accused, who have a lawyer, and is likely to be even more prevalent among unrepresented accused.

Negotiating on a level playing field: full disclosure

Accused persons have a constitutional right to

disclosure of all relevant information the Crown has about the charges, whether the case is disposed of by trial or plea. Represented accused exercise this right through defence counsel, who obtain disclosure on their behalf, evaluate the information and determine whether a guilty plea is advisable. Unrepresented accused, by contrast, may not know even that the right to disclosure exists, still less how to obtain information from a crown attorney or what to do with such information.

The Ontario Legal Aid Plan has responded to this problem by making duty counsel available to assist unrepresented accused persons obtain disclosure. This facility should be expanded and formalized. In particular, once approached by an accused, duty counsel should be responsible for securing disclosure from the crown and reviewing the information with the accused person, explaining the resolution process and summarizing the accused's options.

6.11 The Commission recommends that:
a) the Ontario Legal Aid Plan be specially funded to ensure that duty counsel is able to assist unrepresented accused persons to obtain disclosure of the case against them.
b) information about such duty counsel services be included in all official documents given to accused persons. This information should use plain language and be available in a variety of languages that reflect Ontario's linguistic diversity.
c) Legal Aid area directors work together with local court administration committees and interested individuals and community groups to ensure that unrepresented accused obtain disclosure in a complete and timely fashion. The views of unrepresented accused persons should be surveyed, and an annual report should be published as part of the Legal Aid Plan's annual report.

Attendance at pre-trial conferences

When the accused is represented, the process for reaching a resolution may entail several preliminary discussions between crown and defence counsel. Towards the end of that process, the lawyers may be joined by a judge for a pre-trial conference that attempts to reach an agreement to present in court.

Accused who have counsel do not attend pre-trial conferences. The primary rationale for excluding them is that their presence may inhibit the informal and free-ranging discussions. Other reasons sometimes given for exclusion of accused persons include security concerns and the need to exchange information that should remain confidential to protect an accused or someone else.

The strength and bitterness of community concerns about secrecy and allegations of betrayal during plea bargaining suggests that the traditional exclusion of accused persons should be re-thought.

6.12 The Commission recommends that:
a) pilot projects in which accused persons attend pre-trial conferences be established. Interpreters should be present if necessary.
b) in cases involving accused persons charged under the *Young Offenders Act*, parents or guardians be entitled to attend such conferences, unless the Act would exclude them from court proceedings.
c) surveys of all participants in these

pilot projects be regularly conducted. Outcomes of these surveys should be reviewed by a consultative committee, which should report to the Attorney General after two years.

In some jurisdictions, a police officer involved in a case accompanies the crown attorney to the pre-trial conference. Justification for this practice is generally that the officer is usually in the best position to provide up-to-date information, such as explaining why full disclosure has not yet been made, or reporting the availability of witnesses or the condition of the victim. Although the attendance of the officer may be benign, an accused person may perceive injustice in such a private meeting.

6.13 The Commission recommends that a police officer connected with a prosecution should not participate in pre-trial conferences unless the accused person is present.

Plea comprehension inquiries

When accused persons plead guilty, they waive their right to a trial. They may do so hoping their co-operation will be rewarded by a reduced sentence, because of remorse or a wish to take responsibility for an offence, to conclude the criminal process, to reduce the time spent in prison before conviction, or for many other reasons. Accused persons may also waive the right when they do not fully understand why they are admitting guilt, are intimidated by the process, or because they feel pressured.

As advocates for the accused, defence counsel are responsible for ensuring that their clients understand the nature and consequences of a guilty plea and freely consent to waive their right to a contested trial. When accused persons are not represented by counsel, responsibility for fair treatment of the accused passes to the judge. In this role, the judge is expected to satisfy herself or himself in open court that the accused understands and voluntarily consents to the plea.

Despite these protections, complaints that accused persons do not understand the implications of pleading guilty, or feel coerced into making a guilty plea are reported by and on behalf of represented as well as unrepresented accused. We also found concerns that many racialized accused are too bewildered or intimidated to speak up if they do not understand court proceedings. This problem is particularly widespread among accused from linguistic minority communities, but may also be experienced by English-speaking accused. The Commission fully endorses a plea comprehension inquiry whenever an accused pleads guilty.

6.14 The Commission recommends that:
a) before accepting any plea of guilty the presiding judge conduct an inquiry to ascertain the accused's comprehension of the nature and implications of the plea, voluntariness and understanding of the independence of the judge. This plea comprehension inquiry should be conducted in language appropriate to the age, education level and linguistic skills of the accused.
b) the Ministry of the Attorney General collect written examples of plea comprehension inquiries for rewriting into plain language, and translate standard questions into various languages that reflect Ontario's linguistic diversity.

c) the Attorney General seek an amendment to the *Criminal Code* requiring a sentencing judge to conduct a plea comprehension inquiry whenever an accused pleads guilty, regardless of whether the accused is represented by counsel.

Mandatory charging

The main issue raised during our investigation into victims' concerns about charging practices was mandatory charging in family violence cases. While exceptions are permitted in unusual circumstances, the policies are intended to reduce or eliminate both police discretion to handle such incidents informally and crown attorneys' discretion to withdraw charges or otherwise abandon prosecutions. Of particular importance is the rule that charges should be laid and prosecutions proceed even against the victim's wishes.

Many racialized women do not see the criminal justice system as an ally, but as an overly intrusive and destructive force. Though they might, at times, wish to call the police for assistance in calming a violent or potentially violent confrontation at home, they also want some control over the consequences of doing so. They particularly want to limit their subsequent involvement in the criminal justice system, which they may perceive as alien, overwhelming, and a source of yet more problems.

The Commission believes that laying charges in cases of domestic violence should continue to be mandatory. The general principle behind mandatory charging is well motivated and appears to be working successfully in many communities. However, too rigid adherence to this policy in the prosecutorial stage may have adverse consequences. When a woman decides that proceeding with prosecution will harm her, this decision should be respected.

6.15 **The Commission recommends that whenever crown attorneys are satisfied that a woman has decided voluntarily, and not as a result of coercion by the accused or others, that prosecution of an assault charge will harm her, her decision should be treated as constituting "exceptional circumstances" requiring withdrawal of the charges.**

Justice services for victims and witnesses

Often victims find their encounters with the criminal justice system a traumatic experience, that intensifies anxiety and amounts to "secondary victimization." Victims complain about receiving little information about the progress of investigations or charges. Above all, trials are often devastating for victims or witnesses who seek recognition of their suffering, because of the intense interrogation during which there is no presumption that they are the injured party.

In response to this problem, Ontario has developed the Victim/Witness Assistance Program. It provides victims with information and support during the charge management process, and prepares them for a contested trial. The Victim/Witness Assistance Program, however, generally does not appear to be reaching many vulnerable women in black and other racialized communities. Also arrangements for interpreter services are frequently ad hoc, so many women and children from racialized communities are less well served than English- and French-speaking clients.

The primary access barrier for black and other racialized victims is lack of information about the program. Our investigation suggests that although information is reaching some women from racialized communities, more needs to be done.

Since communication is the essence of the Victim/Witness Assistance Program, we were surprised to learn that its official mandate does not provide for cultural interpreter services. At some sites, the program co-ordinator has access to well-trained cultural interpreters. But at others, workers rely on volunteers from local agencies or court interpreters. Volunteer interpreters cannot be expected to be available whenever their services are needed. And there is no guarantee of confidentiality and the quality of interpretation when volunteers are used. Such an essential service should not depend on volunteers.

6.16 The Commission recommends that regional senior crown attorneys:
a) conduct annual surveys of local crown attorneys, staff and users of the Victim/Witness Assistance Program to determine linguistic needs of victims and witnesses in each region and identify deficiencies in the provision of translated information.
(b) work with the Victim/Witness Assistance Program, community-based agencies and the police to expand the distribution and dissemination of information about the program to racialized communities.

6.17 The Commission recommends that the Victim/Witness Assistance Program be expanded to serve all of Ontario's trial courts and to include cultural interpretation services.

7

Court Dynamics

The Commission's research indicates that many Ontarians perceive courts to be unfairly biased against black or other racialized persons. It also shows that judges and lawyers are generally aware of these views, at least insofar as they are held by racialized persons. Some judges react instead by insisting the perceptions are groundless, not widely held or insignificant because they are based on anecdotes.

To treat differential outcomes as the sole valid indication of systemic racism is to overlook the significance of the *appearance* of injustice to users and observers of the court system. Beliefs about injustice in courts are sustained by how individuals experience the court system and how they report their experiences to others. Thus the appearance of injustice is largely formed by perceptions and fed by anecdotes.

We organized our research to identify courtroom practices and interactions that contribute to the appearance of racial injustice.

Uses of foreignness in Ontario criminal courts

The tendency for judges, justices of peace and

lawyers to refer to individuals' foreign origins or ethnic background is a significant cause of perceptions of racial injustice in the courts. Upon hearing or learning of such references, racialized persons assume that origin must matter to the criminal justice system — or else the statements would not be made — but it is hard to know what legitimate goals are served by the court system taking account of origin.

Basic findings about references to foreignness

Despite the *Criminal Code's* silence on the relevance of citizenship, immigration status, place of birth or origin to criminal proceedings, our research shows that these matters are routinely raised in court. A study of proceedings in Metro Toronto courts found that references to country of origin, immigration status, years in Canada and other indications of "foreignness" occurred in a third of non-bail hearings involving black or other racialized accused and 28 percent of bail hearings.

Findings of the Commission's surveys of judges and defence counsel also suggest that references to foreignness are more common in cases involving racialized accused persons than white accused. However, the vast majority of crown attorneys clearly do not share the same perception.

The Commission conducted a more detailed examination of references to foreignness in all 101 bail review and variation applications made in January 1994 to the Ontario Court (General Division) in Metro Toronto. Of the 92 transcripts that were available, 62 (68%) contained references to foreignness. Within this sample, bail hearing transcripts for four out of five "Asian" accused persons, but only one out of ten "South Asian" accused persons, had such a comment. Transcripts of bail hearings involving black or white accused were in the middle; references to foreignness were made in about half of the cases for both groups.

Explanations of references to foreignness

The Commission's research discloses three basic patterns, which we describe as "bad apple," "hidden agenda" and "apparently benign" uses of foreignness.

"Bad apple" cases

Blatantly hostile references to foreignness or ethnicity and other racist comments made by a judge do great damage to public confidence in the criminal justice system. Responses to the Commission's surveys, and experiences recounted during consultations with lawyers, confirm that a small minority of judges are known to be what we term "bad apples." We were told repeatedly that indications of presumed foreignness such as race, culture, colour and country of origin routinely result in adverse comments or decisions by these judges.

The significance of racist remarks made by judges in court, even if infrequent, cannot be over-emphasized. While many people find such remarks offensive, racialized persons who experience or hear about them may feel outrage and shock, a deep sense of injury and sometimes, fear. They tell their friends, families, colleagues and neighbours about what happened.

This classic human response highlights two important points. First, though members of racialized communities may generally believe that courts, like other social institutions, are systemically racist, they do not expect to encounter explicit racism in an Ontario courtroom. They tell the story and it circulates within the community, precisely because explicit racism is *not* supposed to occur in court. In effect, the stark contrast

between expecting fair treatment and experiencing a racist remark causes such judicial comments to have a profound and pervasive effect.

Second, it is not so much the frequency of racist incidents in courts as the criminal justice system's reaction — or lack of reaction — that sustains perceptions of systemic racism. Unfortunately members of the wider community have no means of knowing about private responses and successful avoidance strategies. Instead, they experience the justice system as denying or disregarding, and hence tolerating, inexcusable conduct.

One problem is that the criminal justice system's response to judicial misconduct relies entirely on complaints. Unless a formal complaint is filed with a judicial council, even a blatantly racist act elicits no institutional response. The failure of the victim of a racist act to complain does not end the problem, since the act reflects badly upon all those within the criminal justice system — no matter how many are acting with fairness, diligence and integrity — as long as it is unopposed. The criminal justice system must have a process for demonstrating publicly that racism will not be tolerated wherever or whenever it occurs.

Such a process must have three main elements, all of which must be widely publicized within the community. These elements are standards of judicial behaviour; mechanisms to report judges who fail to meet the expectations; and effective procedures for responding to inappropriate judicial conduct.

Public evidence that in practice the system upholds the standards is also fundamentally important. We are concerned that the existing complaints systems may be inadequate to deal with even explicitly racist judicial conduct. These systems rely upon the offended person or a third party to file a written complaint. Defence counsel may view filing a complaint on behalf of a client as time-consuming and potentially jeopardizing future cases before the judge in question and, possibly, some of the judge's colleagues. Crown attorneys may well have similar views. Other judges may be the last to hear of problems and, in any event, may be unwilling to file a complaint against a colleague. Accused may view a judge's racist comments as being low on the scale of problems they face, and their court experience may leave them too intimidated to challenge a judge's conduct.

7.1 The Commission recommends that:

a) the Law Society of Upper Canada establish a complaints office where anonymous or confidential complaints about racist conduct by judges or lawyers may be filed.

b) this office informally investigate such complaints and, where they are confirmed, file a formal complaint with the Ontario or Canadian Judicial Council in the case of a judge, or initiate disciplinary proceedings in the case of a lawyer.

c) the confidentiality of the complainant be protected. When a factual dispute arises, the complainant should be advised that further processing of the complaint requires filing it directly with the appropriate body.

d) lawyers be under an ethical obligation to report to the complaints office any racist conduct they observe on the part of a judge, lawyer, other officer or employee of the courts.

e) all other officers and employees of the courts also be encouraged to

report any racist conduct to the complaints office.

7.2 The Commission recommends that the Law Society widely publish information about itself and the complaints mechanism, including information about how to obtain assistance in making complaints. In providing such information, the Law Society should strive to eliminate cultural and linguistic barriers and, where necessary, help members of the public in preparing formal complaints.

7.3 The Commission recommends that:
a) the Law Society of Upper Canada establish an ethical obligation, together with practical guidelines, to govern lawyers' conduct when they observe racist acts.
b) judges and lawyers take every available opportunity to counsel any colleagues who make racist comments, even outside the courtroom, that such statements are unacceptable and reflect badly on the Ontario criminal justice system.

"Hidden agenda" cases

Some uses of "foreignness" in courts reflect a more subtle motive. In these cases, lawyers draw attention to a person's foreignness in hopes of eliciting an adverse reaction to the individual from a judge, jury or justice of the peace. Although we found that these "hidden agenda" references to foreignness are frequently used by both crown and defence or duty counsel, we noted that they are most used by crown attorneys about accused persons, or sometimes about witnesses. In effect, a crown attorney assumes, rightly or wrongly, that the judge, jury, or justice is more likely to decide against the accused if the accused is portrayed as "foreign." Whatever the specific motivation or result, the comment is no less racist.

Such a portrayal of a black or other racialized accused person is one of many ways of suggesting to the court that the accused is not "one of us". References to other attributes, such as lifestyle, unemployment or welfare status, transience or where the accused person lives may have much the same effect. Whatever the attributes chosen, the point of referring to them is to distance the decision-maker, as well as the speaker, from his or her common humanity with the accused person. Once this distance is created, the element of empathy that is so crucial to the exercise of discretion is likely absent.

It is highly improper for Ontario crown attorneys to be motivated by notions of "winning" and "victory." Their task in the courtroom is to present the case for the state effectively, but always within the framework of a fair trial. It is a serious departure from this principle deliberately to introduce race in order to prejudice an accused.

In general, the current guidelines for crown attorneys appear adequate. Guidelines alone do not guarantee integrity, however. The answer to this problem is not more guidelines, which could also be evaded. Instead, the emphasis should be ensuring a well-grounded understanding of the crowns' duty, and effective evaluation of performance.

7.4 The Commission recommends that judges, justices of the peace and counsel adopt an approach of scrupulously identifying the relevance of any reference to race before it is introduced in court.

"Apparently benign" uses of foreignness

The Commission found that references to foreignness are sometimes used neutrally or in an attempt to portray accused persons favourably. Apparently neutral references — such as simple descriptions of a person's place of birth or date of arrival in Canada — may be made by judges, crown attorneys or defence or duty counsel. Typically, defence or duty counsel have the strongest incentives to make favourable references, but crown attorneys and judges may also do so.

Favourable references to foreignness might be used to:

- explain factors that might otherwise reflect badly on an accused person;
- reduce the damage from a previous hostile or negative reference to a person's foreignness;
- mitigate culpability by showing that an immigrant is unfamiliar with Canadian laws; mitigate a sentence by showing respectability, and;
- highlight drastic consequences of a registered conviction for a non-citizen accused.

Benign uses of foreignness may be acceptable in some circumstances, especially if they help avoid imposing additional penalties on non-citizens that would not be imposed on Canadians convicted of the same offences. But obvious dangers exist of misuse or conveying the impression that "foreignness" is generally relevant to court proceedings. Again, the relevance of any reference to race should be scrupulously identified before permitting it to be used in court.

Experiences of exclusion

The experience of being excluded from court proceedings is a significant reason why black and other racialized persons report lack of confidence in the criminal justice system. Two main problems are identified. First, the speed, complex language and often mystifying procedures of the courts mean that even defendants who speak fluent English (or French in a trial conducted in French) often feel that they are not really participating in proceedings that may have profound consequences for them. Those who rely on interpreters feel even more excluded. The second problem is that the absence of racialized persons in positions of authority and on juries in Ontario courts conveys powerful and negative images of justice as a "white" and exclusionary institution.

Court proceedings

Black, Aboriginal and other racialized Ontarians described the court process as bewildering. They reported feeling confused by the procedures, shocked by the rapid pace, mystified by the language and intimidated by the formal rituals of courts.

These experiences crossed age and gender boundaries, and were shared by victims and other witnesses, as well as accused persons. Although factors such as recent immigration, lack of English or French language skills, or low levels of educational achievement tended to intensify the sense of disadvantage, they do not entirely account for it.

By far the most effective response to this problem is greater restraint in the use of scarce criminal justice resources. As policy-makers and judges have noted repeatedly, many social problems and conflicts that are treated as criminal offences may be handled more effectively by other social institutions. If many of the relatively trivial charges now clogging the machinery of justice were removed from the court system, the remaining serious cases could be managed with greater dignity and respect for everyone involved. Such a change would significantly improve both the appearance and the practice of justice in the courts.

Courtworker programs of information and support for accused persons and victims/witnesses are another mechanism for improving comprehension of court proceedings. Courtworkers may answer general questions that a lawyer is too busy to address, counsel clients and prepare them for court hearings, refer them to community agencies, and ensure that relevant information is brought to the attention of appropriate officials.

7.5 The Commission recommends that:
a) existing courtworker programs be maintained and guaranteed funding by the Ministry of the Attorney General.
b) additional courtworker programs be established, particularly those offering services to youth.

Interpreter services

The right to interpreter assistance is a fundamental right guaranteed by the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada has recently given explicit direction on the right of a person to interpreter assistance during court proceedings. Whenever a court proceeding involves a vital interest of an accused person who does not "understand or speak the language" of the proceeding, she or he is entitled to interpretation that is continuous, precise, impartial, competent and contemporaneous.

The Commission's research indicates that although Ontario has established a basically acceptable system of court interpretation, changes are needed to meet the standards required by the Supreme Court of Canada. We found that interpreters, as well as judges, lawyers and representatives of community agencies involved in criminal justice issues, have serious concerns about the guarantees of court interpreter competence, impartiality and accountability for mistakes.

Competence

Ontario lacks a systematic program for training and accrediting court interpreters. Current accreditation involves preliminary tests of linguistic and memory skills administered by the Ministry of the Attorney General, followed by a two-day training workshop for those who pass. At the end of the workshop, candidates are examined on the Ministry's *Court Interpreters Handbook.*

We received many complaints that the process does not require a period of "shadowing," during which a trainee interpreter accompanies an experienced interpreter into various courts. Interpreters considered learning court procedures and terminology as vital to the development of their competence and confidence in court. Some interpreters also complained that the vital task of honing and maintaining practical skills after accreditation is entirely voluntary.

It is important that the Ministry of the Attorney General fund continuing education as well as initial programs. A schedule of workshops should be established as a condition of retaining accreditation. It would be valuable for the Ministry's Court Interpretation Services Branch to conduct spot audits of court interpreters. Those providing inferior quality of interpretation should be required to requalify for accreditation.

In addition to questioning the interpreter system's capacity to ensure general linguistic competence, many people have serious concerns about the translation of highly sensitive testimony. Representatives of organizations that assist women who have been sexually assaulted or abused by a male family member raised this problem repeatedly. They main-

tained that, all too often, the only available court interpreter for testimony of these victim/witnesses is a male who has no training concerning violence against women, and may not even know the terminology a woman uses to describe such violence. Even worse, the male interpreter may attempt to impose his own value judgments.

7.6 The Commission therefore recommends that the Ministry of the Attorney General:
a) develop objective and consistent accreditation standards for interpretation and translation which should be used to certify training programs for court interpreters. Such programs should include specific instruction on issues of violence against women, and a practicum funded by the Ministry in which trainee interpreters "shadow" experienced accredited interpreters in courtrooms for up to three months.
c) fund translation of a glossary of legal terms and phrases in common court usage into the principal source languages used in Ontario.

Impartiality

Canadian courts have generally insisted on impartiality in interpretation services. Parties to proceedings, relatives and friends of parties or persons close to the events giving rise to a criminal charge are typically viewed as inappropriate interpreters in criminal proceedings. Because some linguistic minority communities are small, however, in practice an accused person, victim or other witness often knows the court interpreter. In many cases, prior acquaintance does not matter and may be unavoidable. But in order to preserve the appearance of justice, an accused person, victim or other witness must fully understand the interpreter's role and be able to object to an interpreter whom he or she does not trust to be impartial. Equally important is that everyone in the courtroom understand that an interpreter is an impartial professional enabling communication, rather than an advocate or supporter of the accused person.

7.7 The Commission recommends that whenever an interpreter is used, the trial judge or bail justice explain the role and expectations of an interpreter in open court. The judge or justice should:
a) state that the interpreter is a neutral professional, employed by the court to translate what is being said. In jury trials, this explanation should be given in the presence of the jury.
b) inform the accused person and any witness that he or she may apply to the presiding judicial officer to replace an interpreter whom he or she feels has a conflict of interest or may otherwise not be impartial;
c) verify that the accused and the interpreter have had sufficient opportunity to ascertain mutual understanding;
d) advise the accused person and the interpreter to alert the judge and request clarification if at any time either is unable to understand or hear what is being said;
e) request that observers who have concerns about the quality of interpretation inform crown or defence counsel.

Accountability for mistakes

The standard mechanism for identifying legal

or factual errors in court proceedings is the official record of proceedings, which is documented by a court reporter and kept for at least six years. In some courts the reporter repeats what is said in court into a microphone; in others the reporter maintains a contemporaneous paper record. While court reporters may faithfully record the interpreters' English (or French) statements, neither method permits recording of testimony given in a language other than that of the court proceedings. Thus, if questions are later raised about the accuracy of the interpretation, the court system has no record of what an accused person or witness said in the source language.

7.8 The Commission recommends that all court testimony and interpretation be audiotaped and retained as part of the official record of proceedings.

Criminal justice personnel and effective interpreting

Many interpreters say that judges, lawyers and justices of the peace do not always understand the general demands of court interpreting or how to communicate with witnesses through an interpreter.

Interpreters stated, for example, that some lawyers and judges have little grasp of the limitations inherent in communicating through interpreters. Interpreters are expected to translate what is said word by word, but in practice this type of translation may fail to convey the meaning accurately and effectively. Just as a lawyer may have to rephrase questions that a witness does not understand, an interpreter may need to use different language levels.

Effective communication through an interpreter is unquestionably an important skill for judges, justices of the peace and lawyers to acquire. It is equally important that judges, lawyers and justices of the peace know how to facilitate interpreters' work. For example, they could learn how better to use interpreter services by understanding the dynamics of interpretation in court proceedings. It is also important to understand cultural interpretation, the time required for interpretation, and when it should be used.

It would be valuable for the Ministry of the Attorney General, in association with the Law Society of Upper Canada and interested community organizations, to prepare a manual of advice and procedures to explain the role of the interpreters and to advise how to work with them.

7.9 The Commission recommends that judges, crown counsel, employed duty counsel and justices of the peace receive training in working with interpreters.

Finally, the Commission's research unearthed a small but significant problem that is relatively easy to correct: interpretation in which statements made in the source language are inaudible to everyone except the person being assisted. Some spectators or non-excluded witnesses present in a court may not be able to understand court proceedings without the assistance of an interpreter. While such persons do not have a constitutional right to interpreter services in court, the principle of open court proceedings makes it desirable to ensure that interpretation is audible in the source language as well as the language of the court. A further benefit of ensuring audibility is the potential for a spectator conversant in both languages to identify errors in the interpretation.

7.10 The Commission recommends that court personnel ensure that

interpretation be audible to persons in the court.

The image of white justice

One of the most frequently cited reasons for the sense of exclusion that racialized court users experience is the under-representation of persons from their communities among lawyers, judges, justices of the peace and jurors. Participants in Commission consultations spoke vividly of fears that white lawyers and decision-makers – even if well-intentioned – neither understand nor relate to the heritages, cultures and experiences of racialized persons.

Under-representation of racialized persons among judges and lawyers

The Commission was told repeatedly that under-representation of racialized persons among judges and lawyers is seen as reflecting assumptions that these Ontarians are less worthy of working as justice system professionals. As such, under-representation repeats and reinforces an unspoken message, that white skin is an indicator of competence.

Over the last few years, courts have slowly begun to reflect the diversity of Ontario. But the Commission's research suggests that lawyers from racialized communities are often treated as if they are out of place. Lawyers from racialized groups are misidentified as accused persons and as interpreters. Such misidentifications occur in public courtrooms, where they could easily have been observed by others. Many from racialized communities would perceive such incidents as profoundly disrespectful toward the lawyer and the lawyer's community. Such incidents may also cause observers to doubt the wisdom of hiring a lawyer from their own community.

Under-representation of racialized persons on juries

Under-representation of racialized persons on juries may convey particularly vivid images of "white justice" in the court system. The absence of racialized persons from jury panels symbolizes their exclusion from the justice system's vision of Ontario society.

We found that many black and other racialized persons perceive members of their communities as under-represented on juries. Specifically, participants stressed that under-representation on juries trying racialized accused persons or "high-profile" white accused tends to promote distrust in the system. Lawyers and judges also expressed concerns that unrepresentative juries in trials of racialized accused might contribute to lack of confidence. Findings from the Commission's general population survey of 417 black, 435 white and 405 Chinese residents of Toronto support the perception that black people are under-represented on Ontario juries. No black residents reported having served on a jury. By contrast, 10 white and 5 Chinese residents reported that they had served on a jury.

The main systemic barriers to participation of black and other racialized people on trial juries appear to be the citizenship qualification and the database used to list the names from which jurors are selected.

Citizenship qualification

Ontario legislation governing jury selection stipulates that jurors must be Canadian citizens. Given the high proportion of Ontario residents who are not citizens, particularly in the major cities, the citizenship qualification inevitably results in widespread exclusion.

Familiarity with Canadian customs and society and a "commitment to the community" are important to the jury system. Reliance on a selection criterion that is easy to determine

and apply has clear administrative benefits. But a more inclusive qualification for jury service could maintain the same values, with little or no loss to administrative efficiency.

Landed immigrants who have lived in Canada for many years, for example, are likely to have greater familiarity with the community than individuals who acquire citizenship after the minimum three-year qualification period. Immigrants pay taxes, rent or buy homes, talk to their neighbours and go to work. Many are as capable of grappling with the standards of the "average member of the community" as those who are officially Canadians. Clearly, it would also be incorrect simply to assume that immigrants, by virtue of their status, are less committed to Canadian society than citizens.

7.11 The Commission recommends that the *Juries Act* be amended to permit landed immigrants to serve as jurors if they have lived in Canada for three years and are otherwise eligible.

Sources for the jury pool

Non-Aboriginal persons throughout Ontario are selected for juries from a Ministry of Revenue database that lists every property in the province, by district. In accordance with the provincial *Juries Act,* the selection program is designed to exclude all non-citizens.

The Commission's research found substantial consensus that reliance on this database may have limitations. As the database is more likely to have accurate information about owners than tenants, the latter are less likely to receive the questionnaire used to select the jury pool. This has clear implications for the age and income level of jurors. Since members of some black or other racialized communities tend to be younger and poorer than white Ontarians, the current database also subtly contributes to racial exclusion.

7.12 The Commission recommends that the *Juries Act* be amended to establish the Ontario Health Insurance Plan database as the source for jury pools in Ontario.

Experiencing formal inequality: the oath

Almost all courts in Ontario use one of two ceremonies to bind and remind adult witnesses to tell the truth: an oath sworn on the Christian Bible or a secular affirmation. Although the two methods are equivalent in their legal effect, in practice there is a hierarchy.

Only after a witness has disclosed "conscientious scruples," "religious belief" or has stated that he or she would not feel bound by the oath is the witness asked to affirm. In this way, the swearing ceremony presumes that the biblical oath is the normal or usual procedure and also that it is acceptable to all witnesses unless they specifically object.

Two reform options are available. Ontario could keep the religious oath but ensure that persons of all recognized faiths are treated equally. This approach would require the court system to make available the holy books and other facilities, such as washbasins and prayer spaces, necessary to permit witnesses of other faiths to bind themselves. It would also require proper storage and handling of holy books and training of court officials who administer the oath.

The other option for ensuring equality is elimination of the opportunity to swear a spiritual oath. Unfortunately, neither option can satisfy everyone. Abolition prevents devout Christians from swearing a religious oath; while expansion may invade the religious privacy of yet more Ontarians than at present. It also carries a great risk of causing offence through inappropriate handling of

holy books and materials.

Abolition is the Commission's choice. It is simple to implement, would tend to reduce the "mythology of courtroom proceedings" and to reflect the modern political reality that Ontario is part of a secular state. A secular "oath" satisfies the court's need for witnesses to appear to have bound their consciences, in accordance with the requirements of the *Canada Evidence Act*.

8

Imprisonment After Conviction

Overview of sentencing

Canadian judges have wide discretion at sentencing. They are expected to balance competing goals of punishment — such as deterrence, rehabilitation and denunciation — and to consider a variety of factors about individual accused and their offences.

What are the implications of the individualized approach for the fundamental principle of equality before the law, especially that of racial equality? The answer largely depends on what factors are viewed as sufficient to justify a less serious sentence (mitigation). For example, if the courts consistently restrict mitigation only to factors (such as steady employment) that may indirectly discriminate against black and other racialized accused then the individualized approach may result in inequality in sentencing outcomes.

Sentencing outcomes: our major study

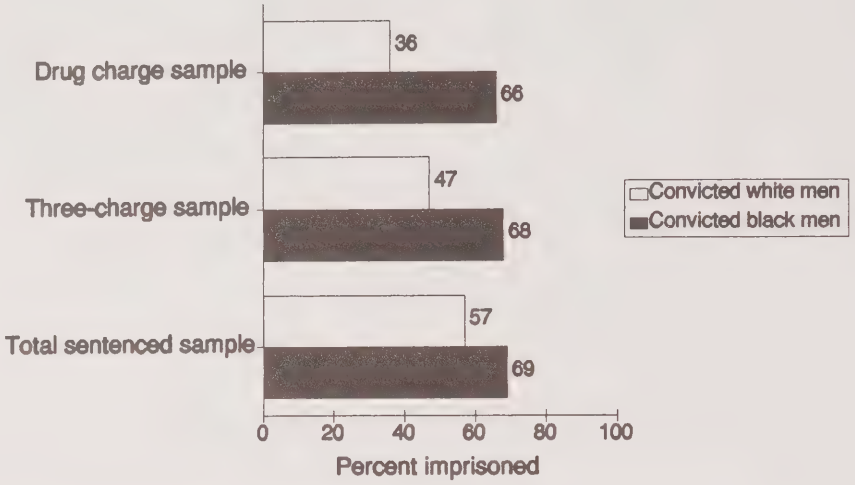
The overwhelming concern expressed in Commission consultations is that black men are disproportionately vulnerable to incarceration. To investigate this we conducted a major statistical study of sentences of imprisonment imposed on black and white adult males sentenced for any of five offence types: drug charges, sexual assaults, bail violations, serious non-sexual assaults and robbery, using the same data as the study of pre-trial detention in chapter 5. The original sample consists of 821 adult males classified by police as black and 832 adult males classified by police as white.

Differential imprisonment rates

About two-thirds of the black convicted men in the entire sample, the three-charge subsample (sexual assault, bail violation and drug charges) and the drug offence sample received a prison sentence. By contrast, the proportion of white convicted men sentenced to prison varies depending on whether the sample includes those sentenced for all five offences (57%), three offences (47%) or drug offences only (36%).

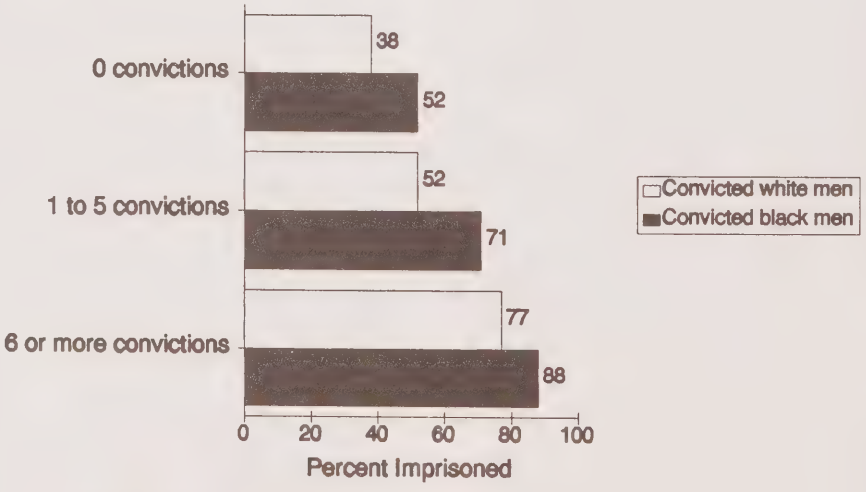
What appears to be a relationship between being black and being sentenced to prison could conceal other differences that matter in sentencing.

Figure 8-1: Imprisonment rate after conviction, by race



Source: Canadian Centre for Justice Statistics

Figure 8-2: Imprisonment rate after conviction, by race and criminal record



Source: Canadian Centre for Justice Statistics

Seriousness of offences

One explanation for the basic findings of differential outcomes could be if black convicted men were sentenced for more serious offences than white convicted men in this study. We tested the data for three indications of significant differences in offence seriousness. The first relates to the seriousness of the criminal offence category. Our finding is that the offences committed by the white sample are at least as serious as those of the black sample.

Second, we compared the specific charges laid against those convicted of sexual assault, bail violation and drug charges. Analysis of the available data revealed no difference in the offences of black and white convicted men sentenced for sexual assaults or bail violations. By contrast, the data showed distinct differences between white and black convicted men sentenced for drug offences.

Of those for whom information was available, 90% of white but only 67% of black accused were convicted of simple possession, while 25% (12 persons) of the black sample but only 8% (6 persons) of the white sample were convicted of possession for the purposes of trafficking. Since trafficking offences are generally viewed as more serious than simple possession, this difference in offences could explain some of the disparity in sentencing outcomes.

Further analysis of the drug offence sample indicates, however, that the difference in incarceration is not wholly due to the nature of the offences. We compared the sentences imposed on black and white accused convicted of the same offence, possession of a narcotic. This analysis revealed that of those known to be convicted of simple possession, 49% of black but only 18% of white accused were sentenced to prison.

Third, an analysis of data on the criminal event that led to the conviction indicates that the criminal incidents of the black and white samples are quite comparable.

Taken together, these findings suggest that the basic findings of differential incarceration rates are not explained by qualitative differences in the offences.

Criminal history

Previous convictions for a violent offence and "offence track record" proved very significant to prison sentences, regardless of race. Comparison of the records of black and white convicted men, however, revealed no statistically significant differences in either characteristic.

The number of previous convictions was strongly related to the likelihood of prison sentences, regardless of race. The noteworthy finding, that white convicted men had more serious criminal records than black convicted men, led us to compare incarceration rates at each level of record.

Regardless of race, convicted men who had previously served a prison sentence were more likely than those without a prison term on their records to be imprisoned on the current offence(s). Moreover, the longer the previous sentence, the greater the likelihood of imprisonment. Comparison of white and black convicted men in the sentenced sample shows that this aspect of criminal record does not account for the harsher sentences imposed on black accused. The data show, first, no statistically significant differences in the proportions of black and white convicted men who had served a previous prison sentence. Second, of those who previously had been sentenced to prison, white convicted men had generally served longer sentences than black convicted men.

Regardless of race, the more recent the last conviction, the more likely it was that the

convicted person would receive a prison sentence. Comparison of black and white convicted men with previous records reveals that black convicted men had less "clean time" (offence-free) than white convicted men.

Regardless of race, accused who were on bail or conditionally released from prison on parole or mandatory supervision when charged were significantly more likely than those not under supervision to be sentenced to prison. Comparison of black and white accused, however, revealed no significant differences in the proportions of black and white accused recorded as under criminal justice control when charged.

Criminal justice variables

We analysed three key variables of the criminal justice system to see if they contributed to the harsher sentences imposed on black accused including: the plea; crown election; and imprisonment before trial.

Courts may impose a less severe sentence than might normally be called for on an accused who pleads guilty, especially early in the process, than on an accused convicted after trial. Black accused are less likely to plead guilty than white accused and so are less likely to benefit from any resulting sentencing discount: 20% of black compared with 11% of white accused had pleaded not guilty to the charge(s) of which they were convicted. This factor did not significantly influence incarceration rates across the sample as a whole.

For some charges the Crown attorney may elect whether to proceed by summary conviction or indictment. Summary convictions have much lower maximum penalties than convictions for charges proceeded with by indictment. In practice, maximum penalties are rarely awarded, but sentencing judges may view them as indicating the gravity of the crime.

Comparison of crown elections about black and white accused showed that crown attorneys were more likely to proceed summarily against white (61%) than black (55%) accused. This important finding may be explained in two ways. One is that the crimes committed by black males accused of hybrid offences were more serious than those of similar white accused. The evidence from the analysis of offence seriousness does not support it. Another possibility is that crown attorneys, perhaps after discussion with police or defence counsel, were simply more inclined to proceed summarily on charges against white accused. If so, their decisions may then have independently contributed to differential sentencing.

The analysis revealed a strong relationship between imprisonment before trial and after conviction, regardless of race. This relationship would account for some racial disparity in sentencing since white (30%) were almost twice as likely as black (16%) accused to have been released by the police, while 39% of black but only 29% of white accused had been ordered detained before trial.

Social factors

Judges may consider the "age, mode of life, character and personality" of a convicted person when passing sentence. We gathered data on employment status, employment type, welfare status, place of residence and marital status.

Comparison of white and black convicted men indicated that the two groups differed only regarding employment status. The data showed that 44% of white and 62% of black convicted men were described as unemployed. This finding suggests that consideration of employment status as part of "mode of life" may have indirectly contributed to harsher

sentences for black than white accused.

Further analysis disclosed evidence of racial differences in the incarceration rates of employed convicted men and single convicted men. The data showed that 58% of black employed, but only 45% of white employed convicted men received prison sentences, as did 71% of single black but only 58% of single white convicted men.

Direct and indirect racial discrimination

A multivariate analysis allowed us to see if racial differences in sentencing remained when all the other factors identified in the detailed comparisons were simultaneously taken into account.

We found that within the entire sentenced sample, race did not account for any more of the disparity in sentences than was due to differences in pre-trial detention and employment status. This finding indicates that unemployment and detention before trial had an indirectly discriminatory influence on judges.

In the sub-sample, race had a small but distinct and direct impact on sentencing decisions beyond the effects of other factors. This finding indicates that some black convicted men were sentenced to prison when white convicted men with the same personal and case characteristics received a less severe sentence.

Also within the sub-sample, unemployment, detention before trial, not-guilty pleas, and prosecution by indictment were related to the likelihood of prison sentences. These findings indicate that apparently neutral factors indirectly contributed to higher incarceration rates for black than white convicted men.

Disparity in prison terms

The evidence of discrimination in the decision to incarcerate has complex implications for the length of prison terms. Although our data shows that black convicted men generally received shorter prison sentences than white convicted men, this may have been because white convicted men with similar backgrounds would not have been sentenced to jail at all for similar offences.

Another reason for anticipating shorter prison terms for black convicted men in this study is the fact that many judges give "credit" for time served before trial when determining the length of a prison sentence. Since black convicted men in the sample were more likely to have been imprisoned before their trials, they would be more likely than white convicted men to receive credit for pre-sentence detention.

To investigate these possibilities, we compared the terms imposed on the white and black convicted men who were sentenced to prison. The basic findings showed that across the sample as a whole the average prison terms of black prisoners were significantly shorter than those of white prisoners .

Analysis showed that within the entire incarcerated sample, race had no effect on length of prison term, once pre-trial detention and aspects of criminal record were taken into account. This finding suggests that the shorter prison terms of black prisoners were mostly due to time spent in pre-sentence custody and less serious criminal records.

Within the sub-sample, race had a direct effect on sentence length independent of the effect of time served before trial or criminal record. This finding is consistent with the possibility that sentencing judges viewed at least some black accused found guilty whom they incarcerated as less serious offenders than white accused incarcerated for the same offence types.

Differential imprisonment: conclusions

These findings demonstrate that judges' reliance on the apparently neutral factors of employment status and detention before trial contributed to the higher incarceration rates of black convicted men. We also found an unexplained differential, not due to gravity of charge, record, plea, crown election, pre-trial detention, unemployment or other social factors. In short, some black prisoners would not have been sentenced to prison had they been white. This difference can only be attributed to direct racial discrimination.

What explains these findings of differential incarceration?

In the vast majority of cases, especially in the busy courts of Metropolitan Toronto, judges must decide on sentences quickly and generally without adequate information. Judges depend on crown and defence or duty counsel for facts about the offence and offender, and their assessments may draw heavily on information collected by probation officers.

Judicial discretion at sentencing

Our Commission has no mandate over sentencing policy, which is within federal jurisdiction. But our findings clearly demonstrate the need for reforms to promote racial equality at this key stage of the criminal justice system.

Guideline judgments

Our findings that apparently neutral sentencing principles have an adverse impact on black convicted men suggest that clarification or revision of Ontario Court of Appeal guideline judgments on these principles would assist judges. Among its own cases, the Court could identify ones that provide opportunities to reduce differential sentencing outcomes. In addition, the Ontario Legal Aid Plan should be given special funding to select cases that raise significant issues for racial equality in sentencing.

8.1 The Commission recommends that:

a) the Ontario Legal Aid Plan be specially funded for a program of test cases that may contribute to greater racial equality in sentencing.

b) the Plan publicize this special initiative to lawyers, legal clinics and interested community groups.

c) intervenor funding be available from the Plan for legal clinics and other interested groups to seek leave to raise systemic issues regarding racial equality before the Court of Appeal.

d) the Attorney General of Ontario seek intervenor status on sentencing appeals from federal prosecutions to submit evidence of systemic discrimination.

Credit for pre-sentence custody

Credit for time spent in custody prior to sentencing is particularly significant to black accused who are more likely than others to be imprisoned both before and after trial. The *Criminal Code* gives no direction and judicial practice varies considerably. Other jurisdictions have a standard rule crediting accused. The Commission recommends that Ontario judges allow a credit against any prison sentence of at least one day for each day spent in pre-sentence custody.

References to immigration status

We received persistent complaints that some sentencing judges recommend removal from Canada of accused who are not Canadian citizens. While judges have no power to order deportation during or after sentence, such

remarks are widely perceived as evidence of discrimination against racialized people. Parliament has assigned decisions about deportation to specialized tribunals, which may consider factors unknown to judges passing sentence. The Commission recommends that judges refrain from commenting on whether a person sentenced to incarceration should be removed from Canada unless specifically asked by the person to endorse a recommendation for removal on the warrant of committal.

Judicial education

Within Ontario, the Chief Judge and Chief Justice are responsible for the continuing education of judges. Each court has well-established annual seminars partly devoted to sentencing principles and practices. In addition, each judge is expected to attend refresher courses at which sentencing issues may be discussed.

Specific education on the practical implications of sentencing choices would also be beneficial. Judges often lack crucial information on local programs to serve sentences in the community.

8.2 The Commission recommends that:
a) Regional senior judges maintain an up-to-date catalogue of community services available for non-prison sentences. The catalogue should be distributed to all sentencing judges at local courts, circulated to local probation offices and made available to lawyers and members of the public attending courthouses.
b) Regional senior judges prepare an annual report on local services for non-prison sentences that should be filed with the Chief Judge for analysis and distribution.

Judicial education about the consequences of incarceration is also important. The provincial system holds prisoners sentenced for up to two years and offers correctional programs that may be important to rehabilitation. Most sentenced prisoners are serving much shorter terms, however, and in practice many programs are not available to them.

8.3 The Commission recommends that:
a) the Chief Judge of the provincial division and the Chief Justice of the general division establish programs for judges to visit provincial adult and youth institutions in the regions where the judges sit.
b) educational programs should provide for judges who preside over criminal cases to make such visits within one year of their appointment and at least every five years thereafter.

Crown attorney discretion at sentencing

Crown attorneys provide judges with information that affects sentencing and may also advise what sentence would be appropriate. Crown attorney discretion, like judicial discretion, should be governed by the fundamental principles of equality and restraint.

Specific guidance in two key areas of the sentencing process would considerably enhance crown attorneys' capacity to help judges prevent injustice. The first area concerns accused imprisoned before their trials. Verified information about the amount of time spent in custody is often unavailable to the sentencing judge. Crown attorneys may prevent this injustice by bringing information about pre-trial detention before the court.

The second problem concerns crown discretion in sentencing submissions that involve a "discount" for a guilty plea. The Crown policy of seeking greater sentences the later in the process a guilty plea is entered should be amended to clarify that when an accused is unrepresented, crown counsel should not seek a higher sentence simply because a guilty plea is made at a court appearance rather than before a trial date is set. A safeguard against crown attorneys seeking a higher sentence for the late plea of an accused person who does not understand the process should be built into the sentencing hearing.

8.4 The Commission recommends that the *Crown Policy Manual:*
a) require crown attorneys to obtain and present to a sentencing judge information about any time spent by a convicted person in pre-sentence custody.
b) direct that when a convicted person is unrepresented, crown counsel should not seek a higher sentence simply because the person does not indicate an intention to plead guilty before a trial or preliminary hearing date is set.
c) direct that when seeking more than the minimum appropriate sentence for a similar offender for a similar offence committed in similar circumstances, a crown attorney state the reasons in open court.

Pre-sentence and pre-disposition reports

A pre-sentence report (called a pre-disposition report in the case of a young offender) may be ordered by a judge to "assist the court in imposing sentence." Research on pre-sentence reports suggests that they significantly influence sentencing: rates of concurrence between the recommendations of probation officers and the sentence imposed are high.

Some researchers in other countries have identified subtle factors in pre-sentence reports that may contribute to harsh sentences for black offenders. The Commission did not find any Ontario research into racial differentials in the content of pre-sentence reports and related racial differences in incarceration rates.

8.5 The Commission recommends that Ontario's correctional ministries and the Ministry of the Attorney General conduct research into race differentials in pre-sentence and pre-disposition reports, and into the relationship between pre-sentence and pre-disposition reports and sentencing outcomes.

We raised the question of potential bias in pre-sentence reports in a focus group of experienced white probation officers. Participants had strikingly different responses to examples of comments in pre-sentence reports that draw on stereotypes or implicitly racialize an accused. Some perceived no problem in reproducing harsh descriptions about an accused so long as such characterizations were "substantiated" by the police. Some were more inclined to exclude such labelling as well as what they termed "psychological evaluations". Others felt that such "colourful" comments should be in the report.

The range of views suggests a need for stronger direction on the content of pre-sentence reports. Even if judges ignore stereotypical comments reproduced in pre-sentence reports, the sentencing process should not be tainted by such commentary.

8.6 The Commission recommends that Ontario correctional ministries:
a) direct probation officers to request an explanation in writing whenever a pre-sentence report source provides material that refers to a convicted person's race, ethnicity, immigration status, religion or nationality.
b) direct probation officers to review with their area manager any unsatisfactory explanation of such a reference provided by a source in a public sector agency. If the area manager agrees that the explanation is inappropriate, this should be communicated to a senior supervisor of the source.

A broader view

The criminal justice system should also address the broader problem of the over-use of prison sentences, especially short sentences served in provincial institutions, because restraint is as important as equality. The systemic change necessary to reduce reliance on short prison sentences requires judicial leadership, backed by support from other criminal justice professionals, and partnership with the community. Sentencing should be pragmatic and flexible.

9

Racism Behind Bars Revisited

The Commission visited adult and youth prisons in every region of the province and consulted with correctional workers and management, spiritual advisers who work in prisons, representatives of community agencies actively involved in correctional issues and prisoners of diverse backgrounds. These sources all identified the same three issues as in urgent need of investigation: prison punishments, use of force by staff and access to early releases for adult prisoners.

The context of prison discipline and control: law and policy

Although imprisonment involves the loss of some personal freedom, the law makes it very clear that the state cannot take away all of a prisoner's rights. Formal law and official policies demonstrate clearly that justice is fundamental to the way in which Ontario prisons should carry out their tasks of containing, controlling and rehabilitating prisoners. The fundamental values of equality, fairness, accountability and decency are not optional extras to be provided if time and circumstances allow. They should, instead, infuse everything that occurs behind bars.

Prison context of discipline and control

Prisons are "total institutions" with complex social structures and relationships formed in response to the limits and demands of forcing large numbers of people to live, temporarily,

in very close quarters, without choice or freedom. Imprisonment means that prisoners lose virtually all aspects of their right to privacy.

Prisons are also highly stressful environments for the men and women who do the surveying, the guarding and the decision-making. Fairness and accountability may matter to staff and management in other areas of their lives, but inside the prison it is all too easy for them to see these as secondary to the capacity to control prisoners and maintain order.

Correctional workers are as subject to the influence of stereotypes or punitive goals as anyone in the larger society. Such toxic elements in this isolated environment are strongly associated with what has been called "deformative risk" of prisons — the danger that prisons increase the likelihood of individuals offending after release.

Prison staff who act on behalf of the community and the justice system in a manner which is, or appears to be, arbitrary, authoritarian, brutal or racist, communicate that coercion and abuse are acceptable behaviour, so long as they are backed by "might." Conversely, staff who respond with fairness and decency, especially under intense provocation from prisoners, show by their example how to live up to community expectations.

While the rapid turnovers of prison "populations" and relatively short periods of imprisonment clearly pose special challenges for the provincial system, neither the appearance nor the practice of justice must be compromised. Because persons held in total institutions are highly vulnerable to arbitrary, unjust or unequal treatment, the protections afforded by principles of equality, fairness and accountability must be secured in practice as well as policy.

Prison discipline: misconducts

Prisoners are subject to a system of institutional punishments based on rules laid down by the Ministry of the Solicitor General and Correctional Services. Although the rules are framed in strict terms, prison discipline is a highly discretionary process.

Staff are expected, first, to make the fundamental decision about whether the formal disciplinary process is the best method of handling a problem. Second, when exercising the power to punish, staff and management must interpret prisoners' behaviour within the meaning of the prison rules. Fairness in the exercise of the power to punish is not, however, a matter of personal choice, but a requirement of law and Ministry policy.

A consistent complaint of prisoners is that the power to punish is not used evenly and fairly. They insist that correctional officers target black prisoners, punishing them more frequently, more severely and for less reason than white prisoners. Correctional officers, both black and white, expressed many of the same concerns.

We conducted a small exploratory study of how the power to punish had been used against white and black prisoners at selected Ontario institutions. This research suggests staff use the power to punish differently against white and black prisoners.

Enforcing the rules — reporting discretion

As well as exercising discretion to label conduct as a breach of the rules, staff may also make choices about the offence category. Many of the rules are drafted so broadly that they overlap. Aggressive gestures directed by one prisoner at another, for example, might be viewed as "gross insult" or "threatens ... assault" or as conduct that appears to combine a "defiant attitude" and insulting language.

After deciding that a prisoner's behaviour may be labelled as a specific type of forbidden conduct, staff then face the choice of whether to "charge," that is to report the incident as a misconduct, or to disregard it, perhaps with a warning or caution that "next time" there will be serious consequences.

The discretion to deal with misconduct informally may be as important in prisons as is the discretion to deal with criminal conduct informally outside of prisons. As in the wider community, charging discretion behind bars may be influenced by many factors, including judgments about the seriousness of an incident, beliefs about the value of a formal disciplinary response as a response to the specific problem, (un)willingness to give the prisoner a break, or a desire to secure co-operation on other matters from the prisoner.

Once a correctional officer decides to "label" and "charge" behaviour as a disciplinary offence, she or he has a discretion to segregate a prisoner until further processing of the misconduct report. While the regulation clearly states that segregation may only be used if the alleged misconduct is "of a serious nature," in practice much depends on the interpretation of "serious."

Processing misconduct reports

Once an officer has decided to invoke the punishment machinery, she or he must tell the prisoner of the misconduct "charge" and prepare a written "Misconduct Report." The officer then submits it to an institutional supervisor who must notify the prisoner of the allegations.

Ministry policy anticipates that just as misconducts vary in their seriousness, so should the resources and investigative efforts devoted to processing them. When a prisoner admits to a relatively minor rule violation that is unlikely to attract a heavy penalty, the fact-finding process may involve no more than a brief interview with prisoner and staff member. More serious allegations may require a lengthy investigation in which the facts emerge only after interviews and re-interviews of many individuals.

Superintendent's interview

Once the investigation is completed, the superintendent must, if requested, hold a formal "hearing," at which the prisoner has an opportunity to challenge the case against him/her. Again, the seriousness of the misconduct alleged will influence the nature and the formality of the hearing.

The punishments

After deciding that the allegation against the prisoner has been proven the superintendent must determine the appropriate penalty. For the purposes of selecting a penalty, Ministry regulations draw a distinction between "any misconduct" and "misconducts of a serious nature."

The Ministry does not classify specific misconduct offences as inherently "serious" or "not serious," even for the purposes of deciding the penalty. Instead it guides discretion by highlighting the factors about the prisoner, the incident and its impact on the institution that superintendents should consider when deciding penalties. While this strategy of identifying relevant factors has the advantage of encouraging superintendents to look at the context of a misconduct, it also creates the potential for penalties to be, or to appear to be, disparate, harsh or inexplicable.

There are few practical constraints on the almost open-ended discretion available to correctional officers and superintendents acting as adjudicators. The availability of such broad discretion provides greater opportunities for racist attitudes to influence decision mak-

ing with adverse impacts upon racialized communities.

Misconducts in practice: findings of differential enforcement

The Commission designed a study to investigate disciplinary practices at five prisons that hold significant numbers of black prisoners. Taken as a whole the data show that black prisoners were over-represented and white prisoners under-represented among prisoners charged with misconducts during the study period.

Critics would suggest black prisoners are more likely to break the rules and that correctional officers are just responding to the behaviour. This simplistic view is not borne out by our more detailed analysis which reveals distinctive trends in the rule infractions reported for black and white prisoners.

Policing discretions

Here we report the specific categories of rules for which there were the largest gaps between the representation of black and white prisoners.

Taken as a whole, black prisoners are most over-represented and white prisoners are most under-represented in misconduct reports for "wilfully disobeys an order." By contrast, black prisoners are most under-represented and white prisoners are most over-represented in misconduct reports for possession of banned substances — the misconduct known as "contraband."

The research indicates that black prisoners are more likely to be charged with the type of misconducts that involve interpretation of behaviour, where correctional officers exercise a greater degree of latitude in characterizing the conduct, such as those involving "attitude." Black prisoners are less likely to receive misconducts in which the discretionary powers of correctional officers are limited by the need to show objective proof, such as possession of forbidden substances. By contrast, white prisoners tend to be over-represented in those categories of misconducts that leave correctional officers with a lesser degree of discretion, and they are under-represented in those categories of misconducts where correctional officers have a greater degree of discretion.

Penalty discretion

Evidence of racial differences also emerged in the analysis of the penalties imposed on the two groups of prisoners. Taken as a whole, black prisoners were most over-represented and white prisoners were most under-represented in the "closed confinement" or segregation category of punishment.

It was clearly important to explore the relationship between the type of misconduct and penalty to see if over-representation of black prisoners in this category of penalty simply reflected the nature of the offence charged or the combined effect of policing and punishment choices. This analysis clearly reveals complete randomness in the assignment of penalties to offences.

Efforts should be made to standardize disciplinary proceedings and make them more objective.

9.1 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, within consultation with the Ministry's Anti-Racism Co-ordinator:
a) review the Ministry of Correctional Services Regulations in order to eliminate subjective elements of the definition of misconduct wherever possible.
b) review policies for resorting to

the disciplinary process and imposing penalties in order to achieve greater restraint and consistency.

Use of force by prison staff

One frequently expressed area of concern was the inappropriate use of force by correctional officers in penal institutions. Black prisoners, in particular, consider themselves to be more vulnerable to physical violence by guards.

Their views were supported by some former correctional officers. One officer explained that these occurrences are a result of a traditional punitive correctional philosophy that is still deeply rooted in many staff members. While this "old school" correctional philosophy may have played a significant role in the use of force occurrences, other correctional officers speculate that racism may be a catalyst.

Another area of concern expressed by prisoners, institutional staff and managers, lawyers and prison support groups is the difficulty of investigating and verifying excessive use of force because of the "culture" or "conspiracy of silence" operating in prisons, whereby guards protect each other and prisoner complaints are not believed.

The closed environment of prisons means that outside scrutiny of the conduct of guards will be almost non-existent.

The problem of institutional and personal accountability is further complicated by the short term sentences in provincial institutions, other barriers to making complaints, and the general problem of the credibility of prisoners in establishing misconduct on the part of correctional staff.

Discretionary release from prison

The Ontario correctional system maintains two discretionary release programs — temporary absence and parole — that may permit individuals to begin to reintegrate themselves into the community during the period of a prison sentence. Both parole and temporary absence involve conditional release, which means that individuals remain subject to correctional authority while away from prison and may be returned if they are deemed to have breached a condition of release.

The temporary absence program

In addition to giving prisoners the practical and psychological benefits of spending some time outside the institution, the Temporary Absence Program (TA) may favourably affect how prisoners are treated on their return to prison and their ultimate release date. Participants in TAs often are seen as more trustworthy and reliable than their peers, and treated accordingly. Successful completion of TAs may also influence parole board members when prisoners apply to serve the remainder of their sentence under supervision in the community.

Black and other racialized prisoners and community organizations voiced concerns about access to TA programs. Some prisoners reported difficulties in finding out how to apply for TAs, and many were disappointed that the type of TA they wanted was not available at the prison where they were held. Others perceived racial differences in approval rates within some prisons. They reported significant difficulties in finding out who is responsible for recommendations and approvals of TA applications, or why an application is rejected.

Linguistic barriers

Access to TAs depends not only on eligibility, but also on prisoners' knowledge that the opportunity exists and their understanding of the process. This information is normally given orally or on video during an "orientation session" shortly after a prisoner's arrival at the

institution. Information about TAs may also be posted on prison walls and circulated in leaflets or handbooks distributed to prisoners.

Unfortunately, this information is only available in English or French so that the needs of linguistic minority prisoners are not addressed. None of the prisons reviewed in the Commission's study used professional interpreters to tell prisoners about TAs.

The TA application forms are available only in English and French. Ministry policy provides that access to an interpreter during the TA application process is entirely in the discretion of superintendents, even though the policy accords prisoners a *right* to make oral or written submissions in support of an application. There are no formal standing arrangements for institutions to fund or secure interpreters.

Inconsistency in procedures

The Ministry provides some guidance on basic criteria for assessing TA applications. No other guidance on the TA process appears in law or policy. In the absence of a complete set of provincial standards for the TA process, considerable variation has developed among Ontario prisons. Procedures for reviewing TA applications, and making recommendations to the superintendent also vary. Differences in procedures among institutions are confusing, and may cause the process to be perceived as arbitrary.

Inconsistency may also be found within prisons, especially those where on-duty officers collect information, report and make recommendations to the superintendent about TA applications. Even though applicants receive a copy of the application form with a signature in the recommendations section, the process is experienced as anonymous and unaccountable.

Senior managers of institutions that use this system generally justify it as a means of offering line-staff an opportunity to participate in programming and enhancing the capacity of correctional officers to control prisoners. Prisoners are said to be more likely to co-operate in institutional routines if they know that any one of many staff members may evaluate a TA application. Fairness requires that prisoners be informed of the identity of the person who judges them. A scrawled signature on a recommendation form passed on to an applicant is simply inadequate to fulfil this fundamental principle of justice.

9.2 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, adviced and assisted by the Ministry's Anti-Racism Co-ordinator, review policies and procedures respecting the operation of the temporary absence system in order to establish ministry-wide core standards including the removal of communication barriers.

Case management and access to TAs

The extent of variation in the TA process partly reflects differences in approach within the Ontario correctional system. Prisons which emphasize this important form of community reintegration typically invest more in preparing and selecting prisoners. They may proactively encourage applications, and counsel and assist prisoners to take advantage of these opportunities. Other institutions may be reactive, administering the process with the least possible adjustment to institutional priorities of control and responding only to prisoner initiatives or their own needs.

9.3 The Commission recommends that the Ministry of the Solicitor

General and Correctional Services, in consultation with the Ministry's Anti-Racism Co-ordinator, establish a case management system in all prisons to ensure that every prisoner is advised and counselled about available prison services and programs.

Parole

Parole is a more systematic program than temporary absence. The eligibility criteria are national standards, decisions to grant or revoke parole are made by a provincial board, and persons released into the community are supervised by staff of the Ministry of the Solicitor General and Correctional Services. Preparation of prisoners for parole applications, however, remains with institutional staff. As in the case of TAs, there is considerable potential for disparity among and within prisons in the quality of preparation.

Failure to offer racialized prisoners appropriate assistance with parole applications was one of the key themes of our consultations with advocacy groups and prisoners. It was reported that many prisoners, especially from linguistic minority communities, lack knowledge about the parole system and do not know where to turn for advice. These prisoners were said to be highly vulnerable to correctional officers providing false or misleading information, persuading them not to apply or threatening to withhold support for the application.

The second key theme is differential treatment in decisions to grant or revoke parole. Prisoners from racialized communities were said to be questioned more intensively — and sometimes disrespectfully — than white persons during parole hearings, causing them to lose confidence that they will be treated fairly. They were also said to be more likely than white applicants to be viewed as in need of further incarceration and, if paroled, subject to harsh and unnecessary special conditions of release.

Preparation for parole

Commission visits to prisons, interviews with prisoners, correctional staff, prisoner advocates and parole board members and observations of parole hearings indicate that in many institutions, parole preparation is reactive and unsystematic. Information about parole is available to prisoners in pamphlet form and on video, but little is done to ensure they receive and understand it. Once again, the information needs of linguistic minority prisoners are generally overlooked. Neither pamphlet nor video is available in languages other than French and English and we found no evidence of formal arrangements to secure interpreters when necessary.

Ontario prisons provide staff — Institutional Liaison Officers (ILOs) — to co-ordinate the parole process. ILOs are expected to interview prisoners seeking parole to determine what aspects of a release plan need investigation and verification by a parole officer in the community. These interviews could provide opportunities for prisoners to ask questions and seek clarification of the parole process. In practice, however, prisoners may receive little guidance because ILOs are generally overwhelmed by paper work and often unsure of their role.

9.4 The Commission recommends that the Ministry of the Solicitor General and Correctional Services and the Ontario Board of Parole, in consultation with the Ministry's Anti-Racism Co-ordinator, assign a formal role to Institutional Liaison Officers in a case management sys-

tem such as recommendation 9.3. In particular, these officers should assist prisoners in preparing parole applications, and work to remove communication barriers.

Parole hearings

At the hearing the prisoner is interviewed by a panel of three members of the Ontario Board of Parole. A prisoner may be "assisted" at the hearing by a lawyer or other supporter.

As part of their preparation for hearings Board members are expected to read the entire file on each applicant. Because of time and cost, particularly in considering very short sentences, one document frequently relied upon is a police summary of the offence and the offender prepared for the original bail hearing. In the absence of rules respecting the contents of such documents they often contain gratuitous and occasionally explicitly racist comments.

In the course of the parole hearings which we observed we found evidence of stereotyping of racialized persons, particularly in relation to drugs. In addition stereotypes were raised about the residences of prisoners from racialized communities. Board members' comments about black and Aboriginal prisoners were generally unchallenged by their colleagues.

Public accountability

Unlike the courts which are based on openness and public visibility, prisons are physically designed and operate to exclude members of the public. It is therefore vitally important that mechanisms exist to expose conduct and practices to public scrutiny. We recommend further avenues for public accountability, namely, community advisory committees and specialist legal services.

Anti-racism co-ordinator

It is crucial that this Office be properly funded and receive the full support of the Minister in order to fulfil its functions in a proactive and creative way. A number of the functions which we had recommended in our earlier report relate specifically to increasing the public accountability of Ontario's prisons. Ongoing community involvement in corrections is of primary importance.

Community advisory committees

Our consultations indicate that a critical element of any strategy for reducing racial discrimination in prisons lies in extensive public scrutiny of their operations. The federal penitentiary system has developed a system of Citizen Advisory Committees (CACs), which are authorized by regulations. Committee members are given reasonable access to all parts of the institution, and to all staff and prisoners, and are permitted to observe disciplinary and release hearings, provided the prisoner consents.

Some CACs have interacted extensively with prisoners and staff. Members may act as escorts for prisoners on temporary absence permits, negotiate with superintendents and staff over prisoner grievances, and arrange for prisoners to participate in community education. A similar community presence should be established for provincial institutions, with members drawn from the area of the institution and be representative of the prison population.

9.5 The Commission recommends that:

a) the Solicitor General, in consultation with the Office of the Anti-Racism Co-odinator and local community organizations, establish a community advisory committee for ev-

ery provincial correctional institution.
b) committee members reflect a variety of skills and backgrounds, and the diversity of the local community. A criminal record should not prevent membership.
c) committee members be given of inspection powers under the *Public Institutions Inspection Act* and have access to all parts of the institution, including disciplinary and release hearings if the prisoner involved consents.
d) committee functions include informal resolution of complaints and other assistance to prisoners, and encouraging community education about the correctional system.
e) committees be specifically authorized to advise institutional heads and to require a full, written response to any such advice.

9.6 The Commission recommends that:
a) the Solicitor General establish an Ontario Council of Advisory Committees consisting of representatives of the community advisory committees from all regions of the province.
b) the Council establish liaison and communicate information amongst local advisory committees, organize annual meetings to disseminate information and exchange ideas and work with the Anti-Racism Co-ordinator in monitoring province-wide problems and making recommendations to the minister.

Correctional Legal Clinic

In addition to community accountability, prison practices should be subjected to scrutiny against the legal standards established for them. However, low public visibility of decisions and imprecise standards in the provincial prison environment, create special difficulties for this type of accountability. A special model is needed to provide effective legal advice and representation to prisoners.

There is an obvious need for advice and advocacy on behalf of prisoners in provincial institutions. The clinic model for providing legal services to prisoners allows the development of expertise in this area, which seldom occurs in private practice. Continuity of practice and the accumulation of institutional knowledge would permit the identification of systemic issues and the adoption of a coherent strategy for responding to them.

9.7 The Commission recommends that the Ontario Legal Aid Plan establish a pilot correctional legal clinic in the Toronto area staffed by full-time, salaried lawyers and paralegals.

10

Community Policing

Community policing is a partnership between the police and the community. It requires empowerment of community members and police officers, openness of police services and accountability of the police to the community. It emphasizes peacekeeping, problem-solving, crime prevention, reducing barriers between the police and the community, constructive alternatives to law enforcement for dealing with some offences or offenders and inclusion of citizens in these and other policing activities. Community policing strategies vary considerably from community to community because they depend on the perceived needs of the community, police resources and organizational structure, imagination, leadership and willingness to innovate.

Unfortunately, many of the challenges facing traditional policing are also found in a community policing system. Among the most important challenges is to respond effectively to public concerns about systemic racism in policing services.

Our preliminary consultations showed that concerns about systemic racism in police practices are widespread and deeply felt. Our consultations revealed strongly held beliefs that police authorities tolerate such abusive behaviour. We also found considerable suspicion of community policing, especially among black and other racialized youths. Many feel excluded from the co-operative partnerships with the police that community policing envisages and fear that racial equality is not on the community policing agenda.

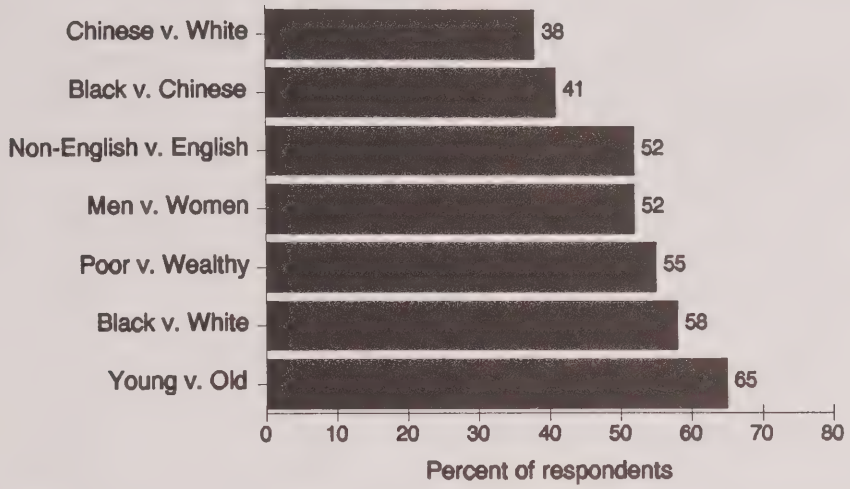
Police authorities obviously have the most influence over practices that police officers initiate. More complex situations arise when the police are implicated in actual or perceived discrimination by other people or institutions. This may occur when a person who requests police services acts, perhaps implicitly, on racialized assumptions. For example, a shopkeeper who holds racialized stereotypes about criminality might call the police and urge that charges be laid against a young black person who steals a baseball cap, but view a similar theft by a white youth as an annoying prank that does not merit police involvement.

Many complaints about policing that we received involved situations such as these, in which the police risked being drawn into discriminatory patterns of enforcing the law or responding to calls for police services. One issue that was raised repeatedly was alleged discrimination when school authorities resort to the police in response to harmful behaviour by students. Privately employed police, such as security officers in shopping malls and other publicly used spaces, may also create problems for community policing.

Perceptions of inequality in policing

A longstanding barrier to successful policing in many black and other racialized communities is the extent to which community mem-

Figure 10-1: Belief that the Metro Toronto Police treat certain groups differently



bers perceive their treatment by police as racially discriminatory. The Commission supplemented our consultations with a survey of Toronto residents, Ontario's largest and most diverse city. We report their perceptions about whether the police treat people equally.

What we found

Most white, black and Chinese Toronto residents think the police do not treat everyone the same. It is clear from these findings that black, Chinese and white residents of Metro Toronto not only perceive racial bias in police practices, but they also perceive a hierarchy of racial bias. Though respondents think there is discrimination against Chinese people, they do not believe it is as common or as severe as discrimination against black people.

Integrating racial equality into policing services

Ontario's large urban police forces, particularly the Metropolitan Toronto Police, unquestionably realize that they must integrate racial equality into their services. In the last few years they have made important changes in institutional policies and procedures, reformed and professionalized hiring and employment practices, and attempted to reach out to the black and other racialized communities. Nevertheless, our findings show that more needs to be done. As was succinctly put in a recent Metro Toronto Police report on race relations in policing, *Moving Forward Together*, "it is not a time for complacency .... the time is ripe for a new departure."

The Metropolitan Toronto Police Services Board in August 1994 implemented a *Moving Forward Together* recommendation by approving this mission statement:

> The Metropolitan Toronto Police is committed to providing an equitable service, by eliminating barriers to access and treating all persons within

> the community and the organization with respect and equality, with no expression or display of prejudice, bigotry, discrimination or harassment toward any person.

The Board also adopted "Achievable Implementation Objectives." By defining expectations and setting objectives for the integration of racial equality into all aspects of police services, the Metro Toronto Police have created a concrete basis for public accountability. Greater steps should be taken to publicize *Moving Forward Together*. Wider circulation of its recommended plan of action would show the public what has been achieved and would demonstrate commitment to change.

> **10.1 The Commission recommends that:**
> **a) each Ontario police service that has not yet done so conduct a comprehensive review of its commitment to racial equality in policing that involves members of police services, community groups and interested individuals.**
> **b) police services widely publicize their action plans regarding equality in the most common languages spoken in their service areas.**
> **c) progress on implementing such action plans be reported to the local police services board quarterly and be publicized widely.**

Accounting to the community

A persistent complaint raised during the Commission's consultations is that traditional structures of police governance are insufficiently accountable and accessible to the community. Ontario's main institutions for civilian governance, police services boards, were said to be too weak to regulate effectively, too distant from the concerns of ordinary people, and too close to police leadership to provide necessary oversight.

Discussions of the powers of police services boards and police chiefs have tended to focus on the traditional policing system. In this system, a police services board is a "top-down" accountability mechanism in a centralized structure of police authority and service delivery. But community policing entails cooperative partnerships between local police officers and the neighbourhoods where they work. Community policing systems thus require a broader and more inclusive accountability that will enable members of different local communities to participate in "the decision-making process which affects priorities, allocations, and the implementation of police services" in their neighbourhoods.

Informal consultation exercises have failed to produce working partnerships partly because community representatives lack the information they need to participate effectively in decisions about problems, priorities and policies. Though individuals and groups may know the troubles of local neighbourhoods, they are largely dependent on the police for systematic information about crimes, policing processes and policy options. Consultation is sometimes perceived as a means of justifying what the police do rather than as a partnership that jointly defines problems and develops solutions.

Another limitation of traditional consultation methods is their failure to address the complexity and diversity of the community involved. Even within the smallest policing areas, the community is rarely homogeneous. What some people view as a problem is a harmless social activity to others. Though community-based accountability demands that the police define their work in concert with

the community, officers cannot act only on behalf of people who insist that the presence or activities of others is a problem.

There are two reforms that would do much to strengthen accountability and promote confidence in community policing among black and other racialized communities. We propose, first, the creation of local community policing committees (CPCs) organized around divisional levels of a police service or such smaller geographic areas or community groupings as seems appropriate. The second proposal is to establish "community safety surveys" to provide the community with systematic information on local safety concerns and problems.

10.2 The Commission recommends that police services boards establish local community policing committees (CPCs) around either divisional levels of each police service or another geographical area or community grouping appropriate to the jurisdiction.

a) CPCs should have seven members, serving three-year terms.

b) CPC members should be drawn from community organizations active in the jurisdiction of the division and appointed by police services boards after a full, open and publicly advertised search.

c) Every effort should be made to ensure that CPCs are gender-balanced and include young persons and members of local racialized communities. A criminal record should not bar appointment.

d) Each CPC should have a designated co-ordinator to attend to administrative needs.

e) Members of CPCs should be paid reasonable expenses and offered honoraria.

f) CPCs should meet monthly and be open to the public. Meetings should generally not occur in police stations.

g) The local police services board should be responsible for monitoring the work of CPCs.

10.3 The Commission recommends that each community policing committee have the following responsibilities:

a) to develop, in concert with the local police division and interested community organizations and individuals, agreements with police that establish policing objectives and standards of police performance that reflect local community needs, and to monitor implementation of such objectives and standards.

b) to develop, in concert with the local police division, specific policing policies and practices as needed. In this role, CPC members should be responsible for forwarding community concerns to division staff, formulating responses and communicating policies and procedures back to the local community.

c) to act as a liaison between the police services boards and the local community. In this role, the CPC should be responsible for informing the community about police services board policies and informing the board about issues in that community.

d) to assist in informally resolving complaints, if requested by both the divisional superintendent and the

complainants.
e) to work together with police, members of the legal community and the judiciary to promote legal and other forms of community education concerning security and the operation of the criminal justice system.

10.4 The Commission recommends that:
a) the Ministry of the Solicitor General and Correctional Services, in association with police services boards, fund community surveys regarding safety in each local community.
b) the surveys occur at least once every five years in each local community.
c) summaries of survey findings be widely distributed.

Racial inequality in police stops

The police have long exercised discretion to stop and question people using roads, and in other public places. Those stopped often experience "police stops" as an unwelcome intrusion by state officials into their lives. Repeated stops heighten the sense of intrusion so that even a polite request may feel like harassment.

Studies from many jurisdictions show that police stopping of and aggression toward black and other racialized people and young working-class males of all origins serves purposes other than crime prevention and detection of offenders. It allows the police to demonstrate to themselves, to people they stop, and to local residents and businesses that the police control public spaces. The Commission's findings show that police stops for the purpose of control are racialized.

The Commission received numerous complaints from across the province about excessive and demeaning police contacts with black and other racialized Ontarians. To obtain a more systematic understanding of the problem, we surveyed black, white and Chinese residents of Metropolitan Toronto. We asked respondents about their experiences of being stopped by police in the past two years. As well as the number of stops, we wanted to know if the respondent was in a car or on foot when each incident occurred, and whether the stop was perceived to be fair.

Frequency of reported stops

The basic findings are detailed in the charts on the following page. People stopped by the police may have many reasons to think they are treated unfairly. An officer may do or say something that embarrasses or humiliates them, or the real or perceived reason for the stop may seem unfair. We asked everyone in the survey who had been stopped by the police in the past two years why they thought the police had stopped them.

Most people from all three groups thought they were stopped for a legitimate reason, such as a traffic violation, a routine automobile spot check or being drunk in a car or in a public place. But many black respondents strongly believe the police stopped them partly or wholly because of their race.

Some respondents felt the combination of their race and other factors led to the police stop, including: expensive cars; perceived association with drugs; and a white female companion. Some white people also mentioned race when asked why the police stopped them. But it was the race of their companion, not their own, that they said was significant.

Table 10-1: Metro Toronto respondents stopped by the police in the past two years, by race

	Black	Chinese	White
Never stopped	71.9%	85.4%	81.8%
Stopped once	11.3%	9.9%	10.2%
Stopped two or more times	16.8%	4.7%	8.0%
Number of respondents	417	405	435

Figure 10-2: Belief by respondents that they were treated unfairly by the Metro Toronto police the last time they were stopped, by race

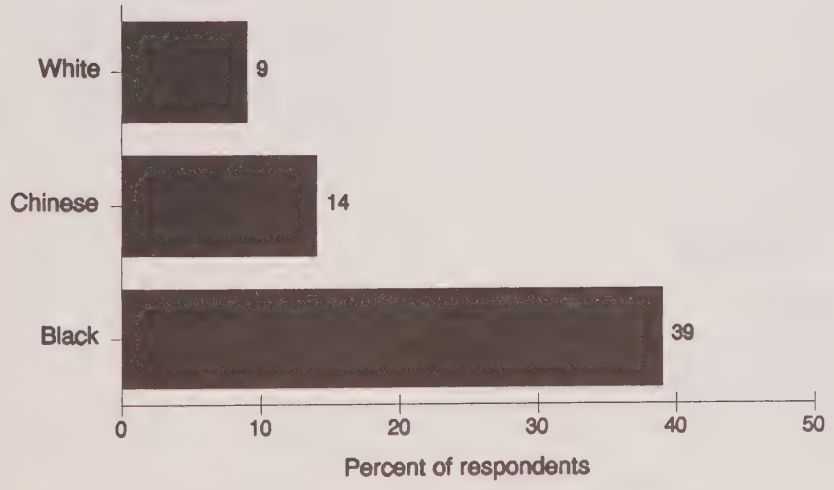


Figure 10-3: Percent of respondents stopped by the police in the past two years, by race and gender

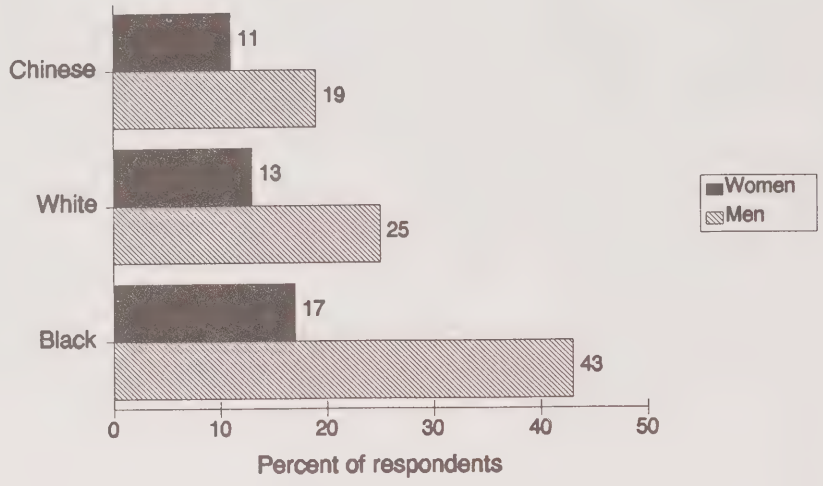


Figure 10-4: Percent of respondents stopped two or more times by the police in the past two years, by race and gender

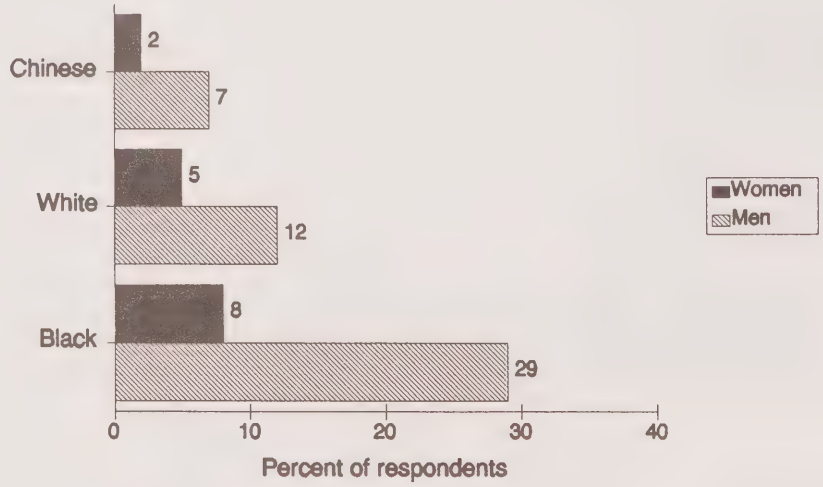


Table 10-2: Metro Toronto male respondents stopped by the police in the past two years, by race and age

Age groups	Black	Chi-nese	White
	%	%	%
18 to 24 years	50.0%	21.7%	47.6%
25 to 40 years	47.7%	19.4%	28.9%
41 years and over	33.9%	14.3%	17.0%
Total male sample	42.7%	18.9%	25.1%

Table 10-3: Metro Toronto male respondents stopped by the police two or more times in the past two years, by race and age

Age groups	Black	Chi-nese	White
	%	%	%
18 to 24 years	46.2%	10.9%	23.8%
25 to 40 years	33.0%	6.9%	16.9%
41 years and over	15.3%	4.8%	5.7%
Total male sample	28.7%	7.4%	12.3%

Implications of findings

The differences in experiences of fairness suggest that some police officers make judgments based on race when deciding whom to stop. These data do not suggest, however, that all Metro Toronto Police officers are overt racists. If racial hostility were the explanation, why would black women be stopped less frequently than black men? Though it is wrong to conclude that all police officers are practising racists, the possibility that some openly prejudiced officers are responsible for the disproportionate number of stops of black people cannot be ignored.

The racial difference in the number and perception of reported stops suggests that the cause is not "a few bad apples" among the police. A more likely explanation is suggested by research into why police officers view a person or situation with suspicion. Studies show that police officers react to combinations of factors they observe in individuals when deciding whether to initiate contact. They also show that in racialized societies, race may become a factor even if official rules prohibit discrimination.

The Commission's findings suggest that racialized characteristics, especially those of black people, in combination with other factors, arouse police suspicion, at least in Metro Toronto. Other factors that may attract police attention include sex (male), youth, make and condition of car (if any), location, dress, perceived socio-economic status and lifestyle. Black persons perceived to have many of these attributes are at high risk of being stopped on foot or in cars.

If community policing is to succeed where traditional policing has failed to produce racial equality, and is to develop confidence that the police treat people equally, how the police exercise discretion to initiate contacts with people must change. This task is particularly challenging because community policing promotes more, not less contact between police officers and members of the community.

10.5 The Commission recommends that:
a) the Ministry of the Solicitor General and Correctional Services, in consultation with the police services and local community organizations, develop guidelines for the exercise of police discretion to stop and question people, with the goal of eliminating differential treatment of black and other racialized people.
b) these guidelines be translated into the most common languages spoken in Ontario and circulated widely.

10.6 The Commission recommends that the Ministry of the Solicitor General and Correctional Services, in consultation with community agencies:
a) formulate a Public Complaints Policy Statement and distribute it widely among their local communities. This statement should emphasize the function of "complaints" not only in responding to specific incidents, but also in helping to identify and resolve systemic problems.
b) develop a comprehensive public complaints database that includes categories that would allow the police to monitor complaints about police stops of black or other racialized people. The database should be used to generate quarterly reports of patterns and trends.

c) fund education on formal and informal police complaint mechanisms.

Community policing and school discipline

Many Ontario schools have developed co-operative relationships with local police services. While the school boards have some flexibility over their policies, procedures and implementation plans, the Ministry of Education requires police intervention for some types of in-school incidents, such as weapons and drug offences, and serious assaults. This approach is sometimes known as "zero tolerance" of violence.

The criminal law should be used with restraint so that "zero tolerance" does not become a vehicle for over-criminalization of students. Many black youths and their parents voiced serious concerns that neither schools nor the police are exercising restraint. They said the police are often summoned for trivial incidents, that schools once handled internally.

Many also expressed concern that the application of safe school policies is targeting black students. They maintained that some schools are quick to summon the police when black students are alleged perpetrators of harmful or inappropriate behaviour, but are more likely to handle similar behaviour by white students internally.

To find out more about the extent of police involvement in school disciplinary practices, we surveyed staff and students of 11 urban secondary schools under the jurisdiction of two boards of education.

Analysis of survey responses reveals three disturbing findings. First, a third of staff members (35%) think black students are more involved than white students in incidents that "require" police intervention at school. Only 1% of staff members think black students are less involved in such incidents. Despite this belief, the staff generally do not perceive "zero tolerance" policies to be targeting students from black or any other racialized communities.

Some staff commented on racialized dynamics that may lead teachers wrongly to perceive black students' behaviour as "dangerous." They emphasized stereotyping, racist provocation of students and teachers' misinterpretations of unfamiliar cultural norms.

The second disturbing finding is that more than half (56%) of the staff respondents believe that teachers are less likely to confront black students for fear of being called racist and a third (33%) believe teachers may avoid confronting other racial minority students for that reason. Comments on student surveys suggest that teachers' fears are known to their classes. Obviously, findings that school authorities are more likely to request police intervention for black students may be related to teachers' reluctance to confront these students.

The third disturbing finding is that black students widely perceive racial differentials in their schools' use of the police and in how police officers treat black students. For example, 50% of black students believe their school is "more likely" to call the police over incidents involving black students than students from other racial groups. By contrast, only 4% of white, 9% of East Asian and 17% of South Asian students believe their school is more likely to call the police over incidents involving members of their racial groups than students from other racial groups.

When asked whether the police, once called to their school, treat all students the same regardless of race, 53% of black students responded that the police treat black students worse than those from other racial groups. A substantial proportion of South Asian students

(28%) believe that the police treat members of their racial group worse than others. Only 4% of white students and 14% of East Asian students feel that the police treat members of their racial groups worse than others.

Policies for involving the police in schools must not compromise community policing in the local area.

10.7 The Commission recommends that police services boards, in concert with their community policing committees:
a) ensure that policies for policing schools reflect the goals of community policing policies and standards in the local area.
b) initiate consultations with school authorities regarding board of education or school-based policies on calling the police into schools.
c) inform parents and youths about school policing issues, and convey concerns about the content or implementation of relevant policies to school authorities.

Community policing and mall security

Bad relationships between security officers and youths may have a significant impact on community policing. Youths often do not distinguish between the actions of police and security officers, because they are generally more concerned about the effects of being policed rather than whether officers are authorized to act by public or private employers.

The authority by which security officers eject or ban people from malls or other publicly used spaces is the *Trespass to Property Act*. No reason or justification for the decision need be given. If the person so directed does not leave immediately, he or she can be charged with the offence of trespassing and, if convicted, can be fined up to $1,000.

The Commission heard repeatedly from black and other racialized youths that mall security officers target them. They reported excessive scrutiny of their activities, rudeness and aggression on the part of security officers, and discrimination in issuing "banning orders" under the *Trespass to Property Act*. Many youths also maintain that security officers overreact and embarrass or humiliate them by calling for assistance from the police. Little appears to have changed since the Anand Report published in 1987.

As part of a study funded by the Commission, a Filipino community organization documented the experiences of 33 Filipino youths who frequented a mall in Metro Toronto. Almost half (45%) reported harassment by security officers, which included racially abusive language, searches and inspections of their purchases. The youths also reported being refused entry (6%), forcefully evicted (15%) and threatened with sanctions (4%). Some had been banned from the mall for defined periods (6%), others indefinitely (11%).

We propose reforms to two elements of the private policing system. The first would restrict the discretion to exclude persons from publicly used spaces. Exclusion should only be possible when based on an objective standard of misconduct. We see no need for banning orders in any circumstances, since repeated misconduct can be met by repeated invocation of the exclusion power.

10.8 The Commission recommends that the *Trespass to Property Act* be amended
a) to include a definition of misconduct sufficient to justify exclusion or detention of a visitor to publicly used space, and to make such mis-

conduct a condition to ordering exclusion or detention.
b) to abolish the right to ban a visitor from publicly used space.

A potential danger with this recommendation is that security officers may compensate for the loss of their private authority to ban individuals by requesting the intervention of the public police. Community policing committees must be alert to this danger and should generally monitor the demands that private security officers place on community policing services.

The second recommendation concerns licensing and training in the private policing industry. At present, Ontario requires security officers to be licensed if they work for specialized companies that supply security services. Directly employed security staff, however, need not be licensed by the province; and neither type of security officer is required to undergo training for serving diverse multiracial communities.

10.9 The Commission recommends that as part of its review of the *Private Investigators and Security Guards Act,* the Ministry of the Solicitor General and Correctional Services
a) undertake extensive consultation to ensure that the legislation responds to the needs of youths, and the particular concerns of black and other racialized youths.
b) examine whether the legislation's licensing requirements should continue to exclude security officers who police publicly used space.
c) consider requiring security officers policing publicly used space to complete anti-racism training programs in order to qualify for or keep their licence.
d) consider having the Registrar of Private Investigators and Security Guards designate certain anti-racism programs as appropriate.

The Commission also has a suggestion for mall owners and managements. Mall owners could help by posting conspicuous signs at the entrances to their publicly used spaces explaining the principal provisions of the *Trespass to Property Act*, the system for laying complaints about a security officer licensed under the *Private Investigators and Security Guards Act*, and applicable private systems for laying complaints about a security officer employed by the owner or management.

11

Systemic Responses to Police Shootings

The number of shootings and the circumstances in which they have occurred have convinced many black Ontarians that they are disproportionately vulnerable to police violence. The deaths and injuries have also come to represent the ultimate manifestation of daily discrimination and harassment that many black people experience in interactions with the police. In short, the shootings are experienced not as isolated incidents, but as tragedies that affect the entire black community, and as reflection of the destructive force of systemic racism.

Since 1978 at least 16 black people have been shot by on-duty police officers, 10 fatally. Criminal charges were laid against the police officers in 9 cases. Not one was convicted. The response of the criminal justice system to these tragic events has been seen as reflecting a lack of accountability.

In 1988, after police officers shot three black men in four months, the Ontario government established the Race Relations and Policing Task Force, which recommended changes in the law and procedures that govern the use of force as well as reforms to police training to reduce the risk of police shootings. The Task Force also proposed that an independent agency be created to investigate police shootings and determine whether charges should be laid.

Within a 50-day period in late 1991, four more black civilians were shot by police officers. The subsequent protests of the black community and the Stephen Lewis report to the then Premier of Ontario in June 1992 ultimately led to the establishment of this Commission.

As part of our mandate to investigate systemic racism in the criminal justice system, the Commission was directed to examine "how the criminal justice system should respond to future charges of criminal conduct against justice system officials and personnel involving racial minority victims." The Commission retained Professor Harry Glasbeek to examine this issue. In this chapter we address concerns about the investigation and charges, the criminal trial and the coroners' inquests.

Investigation and charges

One of the earliest events in the investigation of these cases is police release of information to the media. They have generally provided the media with a version of the incident which presents police officers as facing grave danger and acting legally and properly. The victim is usually portrayed as engaging in criminal activity, having a criminal record, or dangerous. Reference is often made to immigration or refugee status which implicitly characterizes the victim as "foreign" and a threat to Canadian society. In these cases the police fall far below any standard of objectivity which

might be expected of them by manipulating public perception through the control of information. This pattern casts doubt on the system's ability to scrutinize police conduct and to address community concerns that police engage in racist policing.

Investigations of deaths and injuries caused by police officers also pose practical problems which are of concern to members of black and other racialized communities. As highly-trained investigative specialists, police officers may well have the best technical skills for what is likely to be a difficult process of gathering evidence. On the other hand, the well-documented police culture of closeness, loyalty and mutual support among working officers means that police investigations of police officers, even if properly conducted, may lack credibility.

More recently investigations into shootings have usually been conducted by a different force from the one which employed the officer. Often, however, the investigation was started by the employing force, but later passed to another.

Police investigations of shootings by officers did little to inspire confidence that criminal justice officials treat these incidents seriously. Members of black and other racial minority communities, together with a coalition of organizations, for many years advocated the establishment of an independent civilian body to investigate police shooting incidents. Although the Government established the Special Investigations Unit (SIU) in 1990 its structure and performance have fallen short of satisfying the need for an independent and effective investigatory body.

Because the Government failed to give the SIU sufficient financial support so that it could function properly, the SIU entered into what has been described as a secret protocol in April 1991 between Ontario police forces and the Solicitor General's office that handed back investigation of the incidents it was created to investigate to local forces. The public was unaware of this protocol until the shooting of another member of the black community on November 9, 1991 when it came to light. This arrangement confirmed for many in the black community the length to which criminal justice officials were prepared to collaborate to create a public impression of openness while privately agreeing to avoid independent scrutiny and accountability.

11.1 The Commission recommends that funding for the Special Investigations Unit be significantly increased to allow it to carry out its statutory function effectively.

The SIU faces a fundamental problem of antagonism and obstruction from some police services. This has been expressed in various ways, including delays in notifying the SIU of an incident and in reluctance to turn over notes, reports and other potentially relevant evidence. Such delay raises suspicions that there may be some "screening" or review of the form and content of the information and evidence which is being transmitted and that the police have something to hide.

11.2 The Commission recommends that the *Police Services Act* be amended to require that any officer involved in an investigation falling within the jurisdiction of the SIU be required to turn any requested information and evidence over to the SIU forthwith, and in any event no later than 24 hours after the request.

11.3 The Commission recommends that the *Police Services Act* Regulations be amended to provide that the director of the SIU be authorized to charge any officer who fails to provide such information or evidence in a timely fashion with a misconduct offence.

Another problem arises when police officers implicated in a shooting refuse to be interviewed by SIU investigators. In these cases officers typically justify their conduct by reference to the constitutional right to remain silent.

All police officers must accept that the authority to carry and use a firearm in the course of their employment entails a duty to provide a complete explanation of any circumstances in which it is discharged. A refusal to provide such an explanation prevents the SIU from carrying out a thorough investigation as it is required to do by law. It also eliminates the accountability which police officers must have to their superiors in carrying out their duties. Finally, such accountability is crucial to public confidence.

11.4 The Commission recommends that the *Police Services Act* be amended to require that any officer who fails to answer questions from an SIU investigator be suspended without pay.

11.5 The Commission recommends that the *Police Services Act* Regulations be amended to provide that when the director of the SIU informs a chief of police that an officer under the chief's command has failed to give a complete statement to an SIU investigator, the chief shall suspend the officer forthwith without pay.

The treatment of a police officer who may be a suspect is in stark contrast to the usual practice in laying charges against other suspects. Suspects who are not police officers are usually charged immediately with the most serious offence applicable to the facts while the investigation continues. Conversely, the full investigation in relation to police shootings is carried out before any charge is laid, and the charge often appears to be less serious than the facts warrant.

Many of the problems related to the laying of charges will be diminished if the SIU is in a position to carry out a fast and thorough investigation. The director of the SIU will then be in a position to lay charges and if so which charges to lay. However, when charges have been laid they fall under the supervision of a crown attorney. In recent years, an important development has arisen, of referring all charges laid by the SIU, to a special group of crown attorneys who have no ongoing or working relationship with police services. A crown attorney from this unit should be responsible for the prosecution of a police shooting case from the time of the laying of charges to the ultimate disposition.

11.6 The Commission recommends that:
a) a Special Prosecutions Unit be established in the Ministry of the Attorney General to prosecute all charges laid by the SIU.
b) guidelines for this unit be established in consultation with police services, the SIU, defence counsel and representatives of racialized communities.
c) the existence of this unit, as well

as the guidelines under which it functions, be made widely known to the public.

The criminal trial

Even if other justice officials are insensitive or act improperly, the expectation is that the judge (and jury) will set things right at the criminal trial and expose any racist conduct. This is an unrealistic expectation. Unless blatantly racist behaviour is reported, the issue of systemic racism will seldom be considered to be relevant to a criminal trial. While there is no doubt that a criminal trial has many symbolic features, it deals only with specific issues in a rigid manner. The criminal trial cannot conduct a general inquiry into racism.

Where the accused is a police officer charged with shooting a black person, many of the specific elements of the criminal trial process come together to generate a sense of unfair treatment amongst members of the black community and others. Other police officers will be called by the crown attorney to reconstruct the facts at the time of shooting. However, they will likely do everything possible to present their evidence favourably to their colleague.

Another element of the defence strategy often will be to attack the character of the victim. The victim may be characterized as a being prone to violence through evidence of his previous convictions, character or mental "instability." On the other hand, evidence of previous misconduct by the accused officer, such as other incidents of mistreating people in the course of duty, normally will be excluded by the rules of evidence. The contrasting pictures which emerge between the victim and the police officer will be stark.

Where the judge, jury and accused are all white and the victim is black, the combination of the circumstances makes it understandable that black community members may feel that the trial is not fair. Of course, the accused police officer is only taking advantage of the same rules which are available to any other accused person. The problem is that the rules do not have the same effect where the accused is a police officer. For example, where police officers as crown witnesses are obviously being unco-operative with the crown, more aggressive questioning should be permitted even though the witness may not be declared "hostile."

There are other steps which counsel and the judge could take to avoid the perception of elements of race being introduced in favour of the police officer. For example, if there is a black victim, but a white accused, judge and jury, perhaps the crown should ask the judge to instruct defence counsel to avoid descriptions of the officer which even indirectly identify him as being "like" the jury and "unlike" the victim.

The development and sensitive application of rules of evidence and procedure may enhance the fairness of the criminal trial in the eyes of racialized communities. At least such steps will help to reduce misunderstanding and mistrust. However, they will not alter the basic character of the criminal trial, which will remain limited in purpose and scope. Effective and sensitive criminal prosecutions are fundamentally important in police shooting cases. However, a broad inquiry into all of the circumstances related to police shootings, including race, requires another forum.

Coroners inquests

Professor Glasbeek concluded that, unlike the criminal trial, the coroner's inquest has a broader capacity to canvass issues of systemic racism. The *Coroners Act* provides that an inquest is to inquire into the circumstances of a death and determine who, how, when,

where, and by what means death occurred. It also provides for the jury to make recommendations "directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest." The potential scope of this mandate clearly encompasses issues related to systemic racism in police shootings.

Nevertheless, in spite of vigorous representations, for many years coroners refused to include race as one of the issues to be considered. In some of the cases they declined to grant standing to individuals and groups who wished to raise such issues. This restrictive approach was generally upheld by the courts.

In recent years the courts have given greater leeway to applications for standing. However, there remain many limitations to the effectiveness of coroners' inquests as a forum for exploring complex legal, procedural and social issues. Ontario is the only province which still employs solely medically qualified people to conduct inquests. This limitation restricts the capacity of coroners to deal with complex legal and other issues while maintaining a balance between conducting a full inquiry and establishing bounds of relevance.

11.7 The Commission recommends that legally trained persons be preside as coroners when at inquests involving police shootings of civilians. The public should be consulted in the appointment of such persons.

Without legal training coroners rely heavily on the crown attorney assigned to the inquest for legal advice and direction which may promote perceptions of unfairness because of crown attorneys' close association with the police. Similar considerations apply in relation to the coroner's reliance upon police investigators from the force of the officer who had done the shooting.

11.8 The Commission recommends that in cases involving police shooting of civilians, coroners rely exclusively on SIU investigators and crown attorneys from the Special Prosecutions Unit of the Ministry of the Attorney General.

Other forums

The *Police Services Act* establishes the Ontario Civilian Commission on Police Services (OCCPS) which has broad powers to conduct inquiries into police conduct at the request of others or on its own initiative. OCCPS has never exercised its broad powers of inquiry to examine racism in relation to police shooting cases. We were advised by OCCPS that its current budget is grossly inadequate to allow it to initiate and conduct extensive public inquiries.

11.9 The Commission recommends that the Ontario Civilian Commission on Police Services receive full funding, independent of its existing budget, for any inquiries which it may initiate in relation to police conduct.

However, what may be required is a new institution for police accountability which is specifically designed to achieve a remedial mission. The general model developed in relation to anti-discrimination enforcement might be a useful starting point because of the variety of functions which it incorporates: investigation, conciliation, independent adjudication, if necessary, and the power to make broad remedial orders, including compensation for victims. A broad mandate should be

established to go beyond the traditional notion of a "complaint" to address systemic issues. The police, lawyers, government officials, members of racialized communities and others should begin work on developing a model which will achieve these goals.

12

Framing an Equality Strategy for Justice

Specific reforms need the support of a framework for securing racial equality in the administration of justice. This framework has four key elements: anti-racism training of justice personnel, greater employment of racialized persons in the administration of justice, measures to increase the participation of racialized persons in the development of justice policies and monitoring of practices for evidence of racial inequality.

Working for justice

The dominant model of institutional change to secure racial equality emphasizes training of existing personnel and elimination of discriminatory barriers to employment and appointment of racialized persons. Such changes may also enhance confidence that a system is committed to equality in the delivery of services.

Anti-racism training

Many participants in Commission consultations and public forums proposed "anti-racism," "equity" or diversity training as a solution to problems of systemic racism in the administration of justice. Commission surveys of judges also indicate considerable support for such training.

No justice system occupation in Ontario has a comprehensive long-standing program of anti-racism training but most are planning or have recently established some form of training. Responses to these initiatives are mixed. For example, an anti-racism program for crown attorneys met with considerable resistance from some participants and was suspended by the Ministry of the Attorney General late in 1994. By contrast, a training video on "Race, Culture and the Courts" distributed to all judges upon appointment appears to be well received.

Evaluations of police race relations training programs, which are the most well-established of any in the justice system, raise questions about the appropriate content and organization of such training. Research indicates that the beneficial effects of race relations and intercultural training on police attitudes and behaviour are limited.

Training is only one aspect of a comprehensive strategy to secure racial equality in the criminal justice system and is most likely to be effective within a framework where poli-

cies and practices have also been adapted to secure racial equality. The effectiveness of training also depends on what it seeks to change. Research into occupational training identifies three main models for enhancing racial equality in service delivery. One is concerned with increasing trainees knowledge of other cultures, the second emphasizes changes in attitudes, and the third focuses directly on behaviour.

"Multicultural," "cross-cultural" or "intercultural" training seeks to instruct participants about the lifestyles, values, and beliefs of "culturally different" persons they may meet in their work. These programs are based on the assumption that knowledge will dispel prejudice among participants and help them to be more sensitive when providing services to persons from different cultures. This model is widely used within the police, but one expert cautions that such programs may inadvertently promote the attitudes and behaviours they are trying to prevent.

"Racism awareness training" is concerned with attitudes, rather than knowledge. This model attempts to tackle directly the perceived roots of racist conduct: the often subconscious beliefs and assumptions that individuals may hold. Participants learn about historical sources of beliefs that some races are superior or inferior to others. They are shown how subtle forms of such ideas pervade their culture and the systems in which they work and are expected to confront their subconscious assumptions to rid themselves of implicit racist attitudes.

These programs have also spawned controversy, especially among trainees with little prior understanding of systemic racism. Many have difficulty relating histories of racist thinking to their everyday lives and work, some find the approach "too confrontational," reacting with defensiveness, denial or resistance to change.

The third, behavioural model of anti-racism training seeks to equip trainees with the skills to recognize and correct actions that exclude or discriminate against racialized people. Programs may emphasize organizational and systemic factors that influence behaviour as well as the development of critical thinking and problem-solving techniques trainees may use to prevent conduct that may have a racist impact. The content, however, is largely drawn from specific occupational tasks that trainees perform in their working lives. The goals are to alert trainees to often subtle discriminatory practices that they or their colleagues may engage in and develop skills for adjusting behaviour.

One advantage of a behavioural approach is that its focus on job performance avoids ethical concerns that may arise from attempts to change beliefs or attitudes. Though individuals' personal beliefs may be viewed as private, their conduct when delivering services such as the administration of justice is of vital concern to the public and an appropriate target of training. Many experts maintain that a behavioural approach is more likely to have the desired effect on system practices than attempts to change the attitudes of personnel.

Whichever model or combination of models is adopted, anti-racism training has a vital role to play in securing racial equality in the criminal justice system. All justice personnel should be equipped with skills to recognize and respond to conduct that may be discriminatory, disrespectful or exclusionary in their own work and that of others. They should also be trained to adapt service delivery, where necessary to ensure that all users are treated equally.

12.1 The Commission recommends that anti-racism training programs

based on a behavioural model be established for each justice occupation.

12.2 The Commission recommends that:
a) the ministries of the Attorney General and Solicitor General and Correctional Services establish an advisory board to provide guidance on anti-racism training throughout the criminal justice system.
b) half of the board members be drawn from community agencies with expertise in anti-racism, the other half consisting of representative judges, lawyers and correctional personnel. The board should be jointly chaired by a judge and a community member.
c) an orientation program for advisory board members be established.
d) board members be paid reasonable compensated expenses and offered honoraria.

Equality in employment and appointments of justice personnel

As noted earlier in the report, one reason for the powerful sense of exclusion from justice experienced by many black and other racialized persons is under-representation of members of their communities among those who work for justice. Other Commission findings suggest that increased representation of racialized people in the justice system is widely perceived to be desirable.

The population survey of black, white and Chinese metro Toronto residents shows, for example, that, regardless of race, substantial proportions of respondents believe the criminal justice system should include more racial minorities. Surveys of judges also produced support for increased representation of racialized persons in the criminal justice system.

Within the government bureaucracies, employees from racialized communities are generally recent appointments, on the lowest rungs of the corporate ladder, and often hired on limited term contracts. Fiscal constraints have blocked promotions and jeopardized retention of existing employees from racialized communities as well as further recruitment.

The Commission has no intention of proposing growth in the criminal justice system in order to increase the number of racialized people in justice occupations, since growth would conflict with the fundamental principle of restraint in the use of the criminal process. However, such recruitment and promotion that occurs should reflect the principles of equity in employment.

At the time of finalizing this report, the Ontario Government introduced a Bill to repeal the *Employment Equity Act.* This legislation provides a framework to accelerate the dismantling of arbitrary employment barriers, but equity in employment must be pursued even without the assistance of the Act. Racial equality is a fundamental right in Canada, guaranteed by the constitution, and it is fundamental to the integrity of the criminal justice system.

12.3 The Commission recommends that criminal justice official responsible for appointments and employment intensify efforts to dismantle barriers to recruitment, hiring, retention and promotion of racialized people, and continue to monitor progress in achieving representation.

Achieving equality in workplace environments

Criminal justice employees from racialized communities often experience lack of support from colleagues and questioning of their credentials, abilities or suitability for their jobs. Commission consultations with and submissions from correctional staff disclosed widespread experiences of demeaning, insulting and disrespectful treatment. Some talked about the negative effects of being perceived as 'token' employees, hired or promoted to meet a "quota." Workplace harassment is unlawful. It is also specifically prohibited by the Workplace Discrimination and Harassment Prevention Policy of the Ontario Government (WDHP).

Despite this policy criminal justice employees from racialized communities continue to be subjected to offensive and demoralizing treatment. The behavioural model of anti-racism training which we have proposed should assist all employees to comply with their obligations to treat colleagues from racialized communities equally and enhance the capacity of managers to identify and respond to demeaning treatment of staff from racialized communities.

12.4 The Commission recommends that:

a) the Offices of Anti-Racism Co-ordinators establish systematic programs of anti-racism auditing of the workplace environments of Ontario prisons.

b) initial audits of each institution be completed within 12 months, and follow-up audits carried out every two years in randomly selected institutions.

c) the auditing program be developed in consultation with community-based experts on anti-racism and organizational environments.

d) audit findings be made available in a variety of languages and widely distributed.

Participation in policy making

The participation of members of racialized communities in the policy-making process is a vital component of the framework for securing equality in the criminal justice system. Inclusion in policy-making processes may enhance knowledge about and confidence in criminal justice processing within the community, while exclusion may breed suspicion and cause people to feel alienated from the system.

The Commission received numerous complaints about barriers that impede participation in the development of criminal justice policy by members of racialized communities. Four main barriers were identified. The first is lack of general information about how to participate effectively in the process. Members of racialized communities often do not know how policy is made, which means that their views and concerns do not reach policy-makers.

A second, related barrier is lack of information about specific policy issues under consideration. If policy proposals are not shared with the communities in a timely fashion, even those who have some knowledge and expertise in policy development will be unable to make a useful contribution. The third barrier is that members of racialized communities generally lack the resources to hire the lobbyists and "technical experts" whom they perceive to be vital to effective intervention. The final barrier is due to the legacy of previous sporadic attempts to consult with members of racialized communities over the development of justice policy. These have often been organized hurriedly and late

in the process, leading participants to conclude that their input had little or no impact on the substance of the policy.

12.5 The Commission recommends that the ministries of the Attorney General, the Solicitor General and Correctional Services and Community and Social Services:
a) establish standards for securing community participation in developing criminal justice policies.
b) develop a training program for community members who wish to participate in developing criminal justice policy.

Monitoring differential outcomes

Commission findings of systemic racism at key points in the criminal justice process raise the question of whether the framework for securing equality should include monitoring that would permit ongoing statistical comparisons of the treatment of racialized and white persons.

The principal argument against monitoring is that data on the treatment of racialized persons within the criminal justice system will be misinterpreted and misused to make spurious claims about links between "race" and criminality.

Others consulted by the Commission were prepared to consider comprehensive monitoring, so long as the underlying assumptions and goals of data collection and analysis are directed at addressing racism, and community-based controls exist to limit the risk of harmful uses of the data.

Findings documented earlier in this report suggest that the Ontario criminal justice system could benefit from a carefully planned and controlled program of systematic monitoring. But monitoring, of course, only assists in the identification of problems, it does not guarantee they will be solved. Moreover, community concerns about the risk that data will be misused may present a significant barrier to acceptance of such monitoring. This problem is hard to overcome.

12.6 The Commission recommends that:
a) the ministries of the Attorney General and Solicitor General and Correctional Services fund a pilot project to monitor treatment of racialized people in the Ontario criminal justice system. The project should be conducted by a public sector research agency that is independent of the provincial justice authorities.
b) the impact of the project on racial equality in the criminal justice system and on racialized people in Ontario be evaluated after five years.
c) members of racialized communities be involved in developing and evaluating the project. Safeguards against misuse of this information should be developed for its collection, maintenance and distribution.

13

Looking Forward

Systemic racism, the social process that produces racial inequality in how people are treated, is at work in the Ontario criminal justice system. Commission findings leave no doubt that the system is experienced as unfair by racialized people and, at key points in the administration of justice, the exercise of discretion has a harsher impact on black than white people. The conclusion is inescapable: the criminal justice system tolerates racialization in its practices.

What should be done?

Systemic racism is a social process. Eliminating systemic racism from the criminal justice system requires collective action by all of its members. An "aggressive commitment" to the task of securing racial equality is needed. This will require principles of inclusion, responsiveness and accountability to be integrated into all aspects of the criminal justice system together with an overriding commitment to restraint when invocating the criminal process.

The criminal justice system is used excessively to deal inadequately with minor social problems. Restraint is fundamental to the ability of the justice system to "just say no" to attempts to invoke it for every social problem, including the many it cannot solve.

Other ways must be found for dealing with petty problems, conflicts and disputes so that the criminal justice system can deal effectively and sensitively with serious offences that are properly before it. If criminal justice is indeed about declaring and demonstrating respect for fundamental social values, its moral force should not be diluted by overuse when such values are not at stake.

Finally, while lack of restraint may reinforce racialization, restraint helps the justice system to repudiate it. An unrestrained system may contribute to racialization in the wider society through heedless application of its might even to the most trivial incidents that are recorded as offences. Because a racialized person, unlike a white person, is viewed as representing his or her "race," the processing of each trivial offender from a racialized community may reinforce stereotypes about inherent criminality of persons from that community.

An unrestrained system also creates conditions for tolerating racialization within its own processes. The personnel of an unrestrained system may be forced to take shortcuts simply to manage their work. Snap judgments based on perceived patterns and unexamined assumptions flourish in such an environment. Officials may be too busy even to reflect on the risk of discrimination or inappropriate service delivery in their own practices, still less to detect evidence of bias elsewhere in the system.

Conversely, a restrained system may repudiate racialization by refusing to exercise petty control of marginal people who may be

perceived as a nuisance. The personnel of a restrained system have time and resources to exercise discretion with care and solicit additional information that may be necessary to judge fairly persons whose backgrounds are unfamiliar to them. They will have the capacity to respond promptly to indications that services must be changed to secure equality in an increasingly diverse community. Officials of a restrained system may have the time to monitor their own practices for evidence of discrimination as well as those of others.

In addition to exercising restraint, our criminal justice system should strive to be inclusive, responsive and accountable. An **inclusive** criminal justice system delivers services in ways that integrate the needs of all users into a seamless whole. Adaptation is incorporated into routine practices rather than being viewed as "special treatment." By anticipating and integrating the needs of all users, an **inclusive** system avoids delivering its services in favour of those who fit into a uniform mould. An inclusive criminal justice system also secures the fullest possible participation from diverse communities in policy-making, management of the system and service delivery. By securing participation of diverse communities, an inclusive system enhances confidence that justice is open to all.

A **responsive** criminal justice system is open to criticism. It solicits and welcomes the views of users, treating the views of racialized people as worthy of equal respect to those of others. By being open to criticism, a responsive system reduces the risk of passively tolerating racialization in its practices. A responsive criminal justice system is committed to addressing concerns. It treats criticism as a challenge to do better, and takes responsibility for improving its practices. The needs of its users rather than the convenience of its personnel determine its priorities. A responsive system is attuned to symptoms of racialization in its practices.

An **accountable** criminal justice system works in partnership with the community it serves and treats racialized persons as full members of the partnership. It reports, explains and justifies actions and decisions and collaborates with its partners in setting direction. By working in partnership with the community, an **accountable** system reduces the risk of inadvertent acceptance of practices that produce systemic racism.

Appendix A
Terms of Reference

Establishment of Commission

The Government of Ontario established the Commission by Order in Council no. 2909/92, dated October 1, 1992, on the recommendation of the Attorney General.

Commission's Terms of Reference

WHEREAS Stephen Lewis, in his Report to the Premier of Ontario, has recommended the establishment of an inquiry into racism and the criminal justice system;

AND WHEREAS the government recognizes that throughout society and its institutions patterns and practices develop which, although they may not be intended to disadvantage any group, can have the effect of disadvantaging or permitting discrimination against some segments of society (such patterns and practices as they affect racial minorities being known as systemic racism);

AND WHEREAS it is deemed advisable in the public interest to conduct an inquiry into systemic racism and the criminal justice system in Ontario;

NOW THEREFORE, **David Cole** and **Margaret Gittens** shall be appointed Co-Chairs and **Toni Williams, Sri-Guggan Sri-Skanda-Rajah, Moy Tam** and **Ed Ratushny** shall be appointed members of a Commission established to inquire into, report and make recommendations on systemic racism and the criminal justice system in accordance with the following terms of reference:

1. The Commission shall, without expressing any conclusion of law regarding the civil or criminal responsibility of any individual or organization:

    a) Inquire into, report and make recommendations on the extent to which the exercise of discretion, at important decision making points in the criminal justice system, has an adverse impact on racial minorities. This inquiry shall include empirical research.

    b) Inquire into, report, and make recommendations on the treatment of racial minorities in both adult and youth correctional facilities. Other corrections issues shall be dealt with in conjunction with other criminal justice system issues being reviewed by the Commission, as set out in these terms of reference.

    c) Inquire into, report, and make recommendations on the policies of the Ministry of the Solicitor General with respect to community policing and inquire into, report, and make recommendations with respect to the implementation of community policing in Ontario, including existing community policing models being utilized by police services boards.

    d) Inquire into, (by means of a comparative research study only and without hearings), report and make recommendations on how the criminal justice system should respond to future charges of criminal conduct against justice system officials and personnel involving racial minority victims. No findings or recommendations about any ongoing or completed case are to be made. The Commission shall make recommendations on how the practices, rules and procedures of the justice system should operate to address these charges in the future.

    e) Inquire into current measures that address the issue of preventing systemic racism through the selection, education, training, promotion, and discipline of justice system officials and personnel; report and make recmmendations for the improvement of these measures or for the development of others. The selection, education, training, promotion and discipline of police addressed by the Task Force on Race Relations and Policing should be excluded.

    f) Inquire into, report, and make recommendations on the policy making practices of government ministries and agencies with criminal justice responsibilities, and how they could be improved to avoid reflecting or reinforcing systemic racism;

    g) Inquire into, report, and make recommendations on how racial minority communities can participate in the development and implementation of current and future criminal justice system reforms.

    h) Inquire into, report and make recommendations on access to justice services with respect to criminal matters, including criminal legal aid, by racial minorities.

    i) While the issue is not within the mandate of the Commission, the Commission shall consider and make recommendations on the need for future studies into racism inherent in the law.

2. The Commission shall conduct the inquiry in an innovative and creative way, by such means as public meetings, focus group sessions, written submissions and empirical research studies. The Commission shall consult widely with justice system officials and personnel and shall seek out and use creative methods of ensuring commu-

nity participation in its process. The Commission may return to the government to request powers under the *Public Inquiries Act* in relation to specific bodies or issues.

3. The Commission shall utilize anti-black racism as a focal point for their analysis of systemic racism, also recognizing the various experiences and vulnerabilities of all racial minority communities, including racial minority women.

4. The Commission shall pay particular attention to the impact of systemic racism on racial minority youth.

5. The Commission shall not duplicate existing studies and shall take into account current government initiatives, where they reflect a systemic analysis, include community participation and address community concerns.

6. While the subject matter of the Commission shall be systemic racism in the criminal justice system throughout Ontario, the Commission shall focus on urban centres in Ontario.

7. The Commission, in cooperation with the Provincial Government, shall engage in discussions with the Federal Government with respect to the extent to which the Commission will consider institutions under Federal jurisdiction as they affect the administration of justice in Ontario.

8. The Commission shall submit an interim report on treatment of racial minorities in both adult and youth correctional facilities to the Lieutenant Governor-in-Council within four months from the date of its appointment. The Commission shall submit its final report to the Lieutenant Governor-in-Council within one year from the date of its appointment.

9. If allegations regarding individual incidents of wrongdoing are brought to the attention of the Commission, the Commission shall not attempt to investigate them, or make findings of fact about them, and shall refer them to the appropriate bodies.

All government ministries, boards, commissions, agencies are directed to cooperate fully with the Commission and, more specifically, to provide all relevant information to the Commission, and to exercise their discretion under te Freedom of Information and Protection of Privacy Act in a way which facilitates the work of the Commission. All others involved in the criminal justice system who are independent of government are requested to cooperate fully with the Commission.

The Commission shall have authority to engage such counsel, advisors, researchers and other staff and consultants as it deems proper within its budget at rates of remuneration to be approved by the Management Board of Cabinet .

Appendix B
Background Papers

Technical Volume

This volume outlines the research methodologies used on the major research projects conducted by the Commission. It describes such research-related matters as problem identification, sampling techniques, questionnaire construction, variable definitions and data availability. This volume also contains copies of all survey instruments used in selected Commission studies.

The research projects described are:

- Integrated Analysis of Decision-Making in the Criminal Justice System
- Public Opinion Survey of Metropolitan Toronto Residents
- Surveys of Legal Professionals
- Correctional Statistics
- Prison Discipline Study
- Public Forums and Focus Groups
- Surveys of High School Staff and Students
- Racial Minority Police Officers Survey

The Technical Volume is available at:

- Metropolitan Toronto Reference Library
- North York Central Library
- Ryerson Polytechnic University Library
- University of Toronto Centre of Criminology Library
- Osgoode Hall Law School Library

The Technical Volume does not discuss research results. These are discussed in our Report and in the individual research papers that were prepared for each of the projects described.

Research Papers

The following background papers are also available at the above sites:

- Race, Bail, and Imprisonment — Anthony N. Doob
- The Influence of Race on Sentencing Patterns in Toronto — Julian V. Roberts
- Perceptions of Bias and Racism within the Ontario Criminal Justice System: Results from a Public Opinion Survey — Scot Wortley

The Collection and Use of Race Crime Statistics — Scot Wortley
Staff and Students' Perceptions of Disciplinary Practices, the Use of Police, and Race Relations at School: A Preliminary Report — Martin Ruck
Report on Jury Representativeness in Ontario — Langston Sibblies
Report on Youth and Street Harassment — Katherine Liao
Police Services Boards and Police Governance in Ontario — Katherine Liao
Interpretation Services in the Criminal Justice System — Siu Fong
Use of Force in Ontario Prisons — Sadian Campbell
Participation by Racial Community Groups in Criminal Justice Policy Development — Scott & Aylen
Crime and Colour, Cops and Courts - Systemic Racism in the Ontario Criminal Justice System in Social and Historical Context - 1892–1961 — Clayton Mosher
Police Shootings of Black People in Ontario — Harry Glasbeek

Bibliography

A bibliography, prepared for the Commission by the Centre of Criminology, University of Toronto, has been published by the Centre under the title:

Racism in the Criminal Justice System: A Bibliography

Other Background Material

Other Commission studies, research papers and background material will be retained at the Records Management Unit until the end of 1998 and then permanently stored at the Archives of Ontario.

Appendix C
Consultations and Public Forums

Consultations

Aboriginal Consultation
Aboriginal Consultation, Interim Steering Committee
Academics, Lawyers & Community Members
Advocates' Society
Alternative Measures & Bail
Anti-Racism Co-ordinators Corrections
Area Manager, Ministry of Solicitor General and Correctional Services
Asian Group, Prisoners Collins Bay Institution
Assistant Deputy Ministers, Correctional Services
Association of Correctional Managers
Association of Black Law Enforcers
Attorney General, Policy Development Branch
Attorney General, Research Services
Attorney General, Legal Services Branch
Bangladesh Awami Society
Bias Crime Unit, Ottawa Police Force
BIFA Group, Prisoners Joyceville Institution
BIFA IndoPersian Group, Prisoners Collins Bay Institution
Black Inmates & Friends Assembly, Executive Director
Black Coalition for AIDS Prevention
Black Clergy
Black Youth Achievements, Law Awareness Group
Black Inmates & Friends Assembly, (BIFA) Group, Prisoners Warkworth Institution
Board of Police Commissioners, Metro Toronto Police
Brampton Crown Attorney
Canadian Alliance of Black Educators
Canadian Centre on Police Race Relations
Canadian Centre for Justice Statistics
Canadian Bar Association
Caribbean Association of Peel
Central Toronto Youth Services
Central Region, Ontario Board of Parole
Centre for Criminology, researcher Tammy Landau
Chair, Race Relations and Police Monitoring and Audit Board,
Chair & Vice-Chair, Ontario Board of Parole
Chair, Criminal Injuries Compensation Board
Charitable Organization of Jamaican Ex-Policemen and Associates (COJEPA)
Chief Legal Counsel to Correctional Services
Chief Coroner
Child & Family Services Advocate Manager
Chinese Canadian National Council
Classification Officers
Community Policing, Racial Minority Police Officers
Community Policing, Community Activists & Representatives
Community Policing, Black & Other Racial Minority Community Activist, Black Police Officers, Senior Police Management & Police Service Board Members
Community Groups Involved with Adult Corrections
Conflict Resolution Team, Toronto Board of Education
Coordinator Multicultural and Race Relations, Scarborough Board of Education
Correctional managers
Correctional Staff, Guelph Correctional Centre
Correctional Officers
Correctional managers
Correctional Services Official

Correctional Officers
Correctional Official
Correctional Staff, Mimico Correctional Centre
Correctional Services, Deputy Minister
Correctional Staff, East Detention Centre
Correctional Services Division Psychologists and officials
Correctional Law Project lawyers
Correctional Staff & Management Vanier Centre for Women
Correctional Staff, Maplehurst Correctional Centre
Correctional volunteers
Correctional staff, Ministry of the Solicitor General and Correctional Services and Ministry of Community and Social Services
Corrections Staff Training & Recruitment Unit
Court Interpreters
Court of Appeal Judges
Court Liaison Officer, Probation Services, Ministry of Solicitor General and Correctional Services
Criminal Lawyers, Collective of the Ontario Law Union
Criminal Justice Professionals
Criminal Lawyer
Crown Attorneys
Crown Attorney
Curriculum Division, Toronto Board of Education
David Hall, Manager of Dufffferin Mall
Deputy Superintendent, Maplehurst Correctional Centre
Deputy Solicitor General & Senior Staff
Deputy Minister, Correctional Services
Director, Metro Toronto School Board
Duty Counsel
Elizabeth Fry Society, Executive Director
Elizabeth Fry Society, Senior Staff
Elizabeth Fry Society, Residents
Employment Equity manager, Ministry of the Solicitor General and Correctional Services
Employment Equity Program, Correctional Services
Equity Officer, Attorney General
Equity experts and advocates
Executive Director, Metro Toronto Chinese & Southeast Asian Legal Clinic
Executive Committee, Ontario Association of Chiefs of Police
Federal Prosecutors
Federal Correctional Services, Ontario Region
Female Racial Minority Police Officers
Feminist Working Group on the Criminal Justice System Attorney General & Ontario Women's Directorate
Fresh Arts
Gay-Lesbian Police Liaison Committee
Gerald Lapkin, Co-ordinator of Justices of the Peace
Gloucester Police Force
Grievance Administration Branch, MSGSC, Staff
Guelph Correctional Centre Prisoners, Superintendent, Deputy & Senior Staff
Harambee Centre Youth Group
Harbourfront Forum
Harbourfront Community Centre
Heritage Canada
Immigrant and Visible Minority Women Against Abuse
Immigration and Corrections
Implementation of Martins Report Legal professionals
Inspector, Metropolitan Toronto Police Force
Inspector Frank, Amsterdam Police (Holland)
Institute of Social Research, York University
Interpretation and Translation Services, Ministry of the Attorney General
Interpretation Services: Service Providers in the Criminal Justice System
Interpreter Services: Social Service Providers
Jail Superintendent (Federal & Provincial Corrections)
Jamaican Canadian Association
Judge, Judicial Legal Education
Justice C.L. Dubin
Justice Review Project, Director
Justice Review Project, Staff
Justice for Graciela Montans: Meeting Violence Against Women-Systemic Racism in the Criminal Justice System
Justices of the Peace
Kababayan-Filipino Youth Group
Kingston Penitentiary
Law Society Representatives
Law Society of Upper Canada Equity Committee, Chair
Law Enforcement Personnel &Youth
Lawrence Heights: Black Youth & Coping
Legal Aid
London Coordinating Committee to End Women Abuse, Multicultural Subcommittee
London Cultural Interpretation Service
London Coordinating Committee to End Women Abuse
London Inter-Community Health Centre
London Psychiatric Hospital Administration
Management Board Secretariat, Employment Equity Branch
Management Board Secretariat, Employee Counselling Services
Maplehurst Correctional Centre Prisoners, Superintendent, Deputy & Senior Staff
Members of the local Bar Association
Metro East Detention Centre
Metro West Detention Centre, Vanier Centre for Women
Metro Youth Council
Metro Toronto Police Street Crime Unit Officers
Metro Police
Metropolitan Toronto Police Services Board
Millbrook Correctional Centre Prisoners, Superintendent, Deputy & Senior Staff
Minister of Community and Social Services staff and representatives of Ontario Public Service Employees Union (OPSEU)
Ministers Advisory Committee on Corrections
Multicultural Group, Prisoners Pittsburgh Institution
National Council of Jamaicans and Supportive Organizations in Canada
National Black Police Association
National Black Law Students Association
National Joint Committee of the Canadian Association of Chiefs of Police and the

National Capital Alliance on Race Relations
National Council of Jamaicans and Supportive Organizations Canada
Native Court Workers Conference
NOW Magazine, Journalist
Offender Programming Staff, Correctional Services; Policy and Corporate Planning Secretariat, Correctional Services; Childrens Services Branch, Community & Social Services
Office of Child and Family Advocacy
Office of the Public Complaints Commission
Office of the Anti-Racism Secretariat
Office of Youth Justice
Office of Race Relations University of Western Ontario
Ombudsman & Staff
Ontario Multifaith Committee
Ontario Court of Justice (Provincial Division), Toronto Regional Senior Judges
Ontario Civilian Commission on Police Services, Chair and staff
Ontario Human Rights Commission Policy Division
Ontario Anti-Racism Secretariat, Youth Community Placement Program Participants
Ontario Parole Board Member
Ontario Association of Interval and Transition Houses
Ontario Legal Aid Plan, Senior officials
Ontario Public Service Employees Union (OPSEU)
Ontario Anti-Racism Secretariat, Public Sector Unit
Ontario Black Coalition for Employment Equity
Ontario Correctional Institute Prisoners, Superintendent, Deputy & Senior Staff
Ontario Anti-Racism Secretariat
Ontario Public Service Employees Union (OPSEU) - Grievance Officer
Ontario Association of Police Services Boards, Executive
Ontario Board of Parole, Anti-Racism Committee
Operation Springboard
OPP officers, Larry Killens, Elliot Lake
OPP Chief, Tom O'Grady
OPS Network for Racial Minorities
Organizations of Parents of Black Children
Organizations Working with Youth Exposed to the Criminal Justice System
Ottawa Bail Program
Ottawa-Carleton Immigrant Services Organization
Ottawa Police Force, Senior Officer
Ottawa Police Service Board
Ottawa-Carleton Area Police and Community Council
Over-policing of Youth in Public Spaces-JOY Change of Future
Over-policing of Youth in Public Spaces-Metro Police Headquarters, Police Officers
Over-policing of Youth in Public Spaces-Youth
Parole Board Members, West Central
Parole Board Member, Western Region
Parole Board Member, West Central
Parole Board Member, Central
Parole Board Member, Central Toronto
Parole Board Member, West Central
Patricia Erickson, Senior Researcher, Addiction Research Foundation and Benedikt Fischer (Germany) researcher
Peel Region, Elizabeth Fry Society
Police Services Board, London
President, Community Service Association
Probation Officer, Ministry of Community and Social Services
Probation Officer, Ministry of Solicitor General and Correctional Services
Probation Manager, Young Offenders
Probation Officer, Ministry of Community and Social Services
Probation Officer, Ministry of Community and Social Services
Probation officers
Probation Officer, Young Offenders
Prof. Michael Tonry, Centre of Criminology
Professor Andrew Ashworth, Professor of Law, Cambridge University, UK
Professor Simon Holdaway, University of Leeds
Professor David Denney - University Lecturer in social work, (London, England)
Provincial Council of Elizabeth Fry Societies
Provincial Division Judges
Race Statistics-Community Members, Academics, Government Officials, Police Personnel
Racial Minority Lawyers
Regional Directors & Managers of Correctional Institutions
Representative, Canadian Translators & Interpreters Council
Representative, Canadian Translators & Interpreters Council
Representatives of Aboriginal groups
Research Director, Ottawa Police Force
Roundtable Discussion on Juries
Royal Commission on Learning, Commissioners
Royal Commission on Learning, Research Team
Safe School Coalition
Scarborough Board, Research Unit
Scarborough Board, Student and Community Services
Scarborough Board, Secondary School Principals
Scarborough Probation Officers
Scarborough Probation Officers
Senior Officers, London Police Force
Senior Judges
Senior Advisor, Research & Statistics, Solicitor General
Senior Correctional Officers
SIU Director
Special Investigations Unit, Director
Sprucedale Youth Centre, Superintendent, Deputy Superintendent, Programming and Placement Officer
Staff Sergeant, Metropolitan Toronto Police Force
Staff, African Canadian Court-Workers Program, Ministry of the Attorney General
Staff Interpreter, Ministry of the Attorney General
Stephen Lewis
Street Outreach Services
Street Crime Unit - 5 District
Student Program Worker, Toronto Board of Education

Students at Rosedale Heights
Superintendent, Mimico Correctional Centre
Superintendents of Metro Correctional Institutions
Syl Apps, Senior Staff
Teaching Staff, Scarborough Board
Temporary Absence Board, Mimico Correctional Centre
Terry O'Connel-Police officer, Wagga, Wagga, New South Wales
Toronto Bail Program Officials
Toronto Bail Program, senior staff
Toronto Board of Education, Pat Case, Ester Cole
Toronto Board of Education, Community Service Office
Toronto Board Anti-Racism Camp - Students & Teachers
Toronto Board Teachers and School Personnel
Toronto Board Teachers and School Personnel
Toronto School Board Teachers and School Personnel
Trustee (Ward 7), Toronto Board of Education
Urban Alliance of London
Vice-Chair, Central Region Parole Board
Vice-Chair, Western Region Parole Board
Violence Prevention Secretariat, Ministry of Education
Western Region, Ontario Board of Parole
Women Immigrants of London
Youth Link, Counsellor
Youth Community Services, North York Public Libraries
Youth Link
Youth in Alternative Measures Program, North York Probation Services, Ministry of Community and Social Services
Youth Unity Symposium
Youth Exposed to the Criminal Justice System
Youth in Alternative Measures Program, Scarborough Probation Services, Ministry of Community and Social Services
Youth & Pre-Trial Encounters, Defence Counsel
Youths-Scarborough Civic Centre
Youths-Central Neighbourhood House, Front Line Staff
Youths-Woodgreen Community Centre
Youths-African Cultural Organization
Youths-Central Neighbourhood House, Youth Workers
Youths-Alert Program
Youths-Change of Future/Youth
Youths-Filipino Youth
Youths-Lesbians/Gays of Colour
Youths-Marcus Garvey Home
Youths-Parents of Black Youth
Youths-South Asian Centre

Public Forums

Thunder Bay - West Thunder Bay Community Centre, October 4, 1993
Sudbury - Civic Square, October 6, 1993
Ottawa - Sandy Hill Community Centre, October 8, 1993
Windsor - Mackenzie Hall, October 13, 1993
Chatham - Chatham Cultural Centre, October 14, 1993
London, London Urban Resource Centre, October 15, 1993
Ottawa - Dalhousie Community Centre, October 16, 1993
Kingston - Kingston Public Library, October 19, 1993
Hamilton - YMCA, October 21, 1993
Toronto - Regent Park Community Centre, October 28, 1993
Scarborough - Warden Woods Community Centre, October 28, 1993
North York - Memorial Hall, November 2, 1993
Mississauga - Noel Ryan Auditorium, November 2, 1993
Brampton - Century Gardens Recreation Centre, November 3, 1993
City of York - Jamaican Canadian Association, November 3, 1993
Oshawa/Durham - Oshawa Public Library, November 4, 1993
Toronto - Parkdale Public Library, November 4, 1993
Pickering/Ajax - Pickering Public Library, November 6, 1993
Brampton - Century Gardens Recreation Centre, November 6, 1993
North York - Westview Centennial High School, November 9, 1993
Toronto - Ontario Science Centre, November 9, 1993
Etobicoke - Elmbank Community Centre, November 10, 1993
Mississauga - Burnhamthorpe Community Centre, November 10, 1993
Toronto - Scadding Court Community Centre, November 13, 1993
Scarborough - Tall Pines Community Centre, November 13, 1993
Oshawa/Durham - Simcoe Hall Settlement House, November 16, 1993
Pickering/Ajax - Pickering Recreation Centre, November 16, 1993
Napanee - Family and Children Services of Lennox and Addington, November 22, 1993
Kingston - Kingston Global Community Centre, November 22, 1993

Appendix D
Submissions

Aboriginal Justice Consulate, Native Council of Canada
African Community Organization of Windsor
Ahmed, Zakir, *Hamilton*
Ames, Robert–Steward Toronto Jail (OPSEU Local 530)
Association of Black Law Enforcers, *Mississauga*
Bald, Hilary, *Beamsville*
Ballosingh, Neal, *Scarborough*
Balm, Gerald N., *Kitchener*

Bell, Don, *Mississauga*
Bennett, Michael, *Sault Ste. Marie*
Black Action Defence Committee, *Toronto*
Black Inmates and Friends Assembly, *Toronto*
Boulay, Michel, *Whitby*
Brantford Ethnic and Race Relations Committee
Briggs, Genevieve, *Windsor*
Canadian Alliance for Visible Minorities, *Ottawa*
Canadian Bar Association, *Ottawa*
Canadian Civil Liberties Association, *North York*
Caribbean Association of Peel, *Mississauga*
Carr, Don, *Brantford*
Centre for Intercultural Development, *Winnipeg*
Chacko, James–School of Social Work, University of Windsor
Chaplaincy Services Ontario
Children's Aid Society of Metropolitan Toronto
Chinese-Canadian National Council, *Ottawa*
Chow, Yuen-Ching, *Rexdale*
Church Council of Justice and Corrections, *Ottawa*
Ciona, Dan, County of Brant, *Burford*
Cochrane, Michael G.–Scott and Aylen, *Toronto*
Cohen, Howard–Barrister, *Toronto*
Cole, Ester, *Toronto*
Coll, Philip, *Guelph*
Community Service Order Association of Ontario
Community Unity Alliance, *North York*
Congress of Black Women, *Mississauga*
Connor, Patrick J., *Toronto*
Copeland, Paul
Criminal Lawyers Association, *Toronto*
Cross Cultural Youth Alliance, *Ottawa*
Day, Mrs. Jean, *Sarnia*
Deitch, James S.–Barrister, *Toronto*
DeRusha, Haig, *Brampton*
Doan, Kevin Khoa, *Toronto*
Doyle, Denise, *Oshawa*
Doyle-Marshall, William, *Toronto*
Duffy, Kevin, *Mississauga*
Elizabeth Fry Society, *Toronto*
Embury, Randy, *Frankford*
Eshkibok, Michael, *Sudbury*
Etherington, Brian–Faculty of Law, University of Windsor
Ethnocultural Council of London
Fagan, John F.–Barrister and Solicitor, *Willowdale*
Family and Credit Counselling Service (RESOLVE program), *Richmond Hill*
Federation of Sikh Societies of Canada, *Ottawa*
Fiji, Gurdial Singh, *Rexdale*
Findlay, James W., *Agincourt*
Francis, Verlyn F., *Toronto*
Giroux, Denise and June Ionson, *Hamilton*
Halton Regional Police Service and Halton Multicultural Council Race Relations Committee, *Mississauga*
Hamilton-Wentworth Regional Police Services on behalf of the Ontario Association of Chiefs of Police
Hamilton, Carla, *Kingston*
Hawthorn, Felicity–Barrister and Solicitor
Horvath, Louis, *Don Mills*
Howard, Janet–Barrister, *Toronto*
Iggers, Daniel P., *North York*
Inkumsah, Eben, *North York*
Islamic Co-ordinating Council of Imams, *Toronto*
Jacobson, Sheila, *Brampton*
Jamaican Canadian Association, *City of York*
Jane-Finch Community Legal Services, *North York*
Jayewardine, Dr. C.H.S.–Faculty of Social Sciences, University of Ottawa
Jewiss, Tom–Native Law, Trent University, *Peterborough*
John Howard Society of Kingston District
John Howard Society of Ontario/Reform Office, *Kingston*
Kababayan Community Centre, *Toronto*
Kay, Gary P., *Oshawa*
Kaye, F. Dan, *Gloucester*
Keep, Evelyn, *London*
Kellway, Donna Killalea, *Toronto*
Kiederowski, John–Department of Criminology, University of Ottawa
King, Winston, *Hamilton*
Korean Canadian Women's Association, *Don Mills*
Krueger, Ronald A.–Barrister and Solicitor, *Toronto*
Labatt, L. M., *Toronto*
League for Human Rights of B'Nai Brith, *North York*
London Alliance on Race Relations
Lockyer, James–Pinkofsky, Lockyer, Kwinter, *Toronto*
Loss Protection Services Training Institute, *Etobicoke*
Lumley, Fernando, *Scarborough*
Lynch, Gray, *Kingston*
Magee, Martin, *Brampton*
Mahoney, Robert, *Windsor*
Maidment, J.M.–Martial Arts Instruction and Consultation, *Etobicoke*
Mayor's Race Relations Committee, *Hamilton*
McGarvey, Matthew, *Toronto*
McMahon, John B., *Toronto*
McMullen, Shirley
Medford, Denys, *Inniskillen*
Meltziner, Julius
Mennonite Central Committee Ontario, *Kitchener*
Ministry of Citizenship, Employment Equity Commission–Juanita Westmoreland-Traore, *Toronto*
Ministry of Community and Social Services, Probation and Community Services–Marc Levine, *Toronto*
Ministry of the Attorney General, Crown Law Office, Criminal–Feroza Bhabha, *Toronto*
Ministry of the Attorney General, Office of Equality Rights, Policy Development Division– Thea Herman, *Toronto*
Ministry of Correctional Services–Deborah Newman, *Toronto*
Ministry of the Solicitor General and Correctional Services, Chief Coroner for Ontario–James Young, M.D., *Toronto*
Minority Advocacy and Rights Council, *Ottawa*
Mohr, Renate H.
Moore, John Caleb, *Sudbury*
Morris, Deborah, *Ottawa*
Moustacalis, Anthony, Defence Counsel

Musbah, Mohamed, *Windsor*
National Symposium of Community Safety and Crime Prevention
National Association of Women and the Law, National Organization of Immigrant and Visible Minority Women of Canada and the Canadian Association of Elizabeth Fry Societies, *Ottawa*
National Council of Canadian Filipino Associates, *Toronto*
Native African Inmates and Families Association, *Willowdale*
Norris, John–Barrister, Ruby & Edwardh, *Toronto*
North York Committee on Community Ethnic and Race Relations
Obembe, Bolaji, *Brampton*
Onkwehohwe Anti-Racism, *Barrie*
Ontario Association of Correctional Managers, *Burlington*
Ontario Association of Corrections and Criminology, *Toronto*
Ontario Association of Police Services Boards, *Toronto*
Ontario Board of Parole (Central Region), *Toronto*
Ontario Conference of Catholic Bishops, Committee on Institutional Chaplaincy, *Toronto*
Ontario Court of Justice (General Division)–The Honourable Mr. Justice Dennis O'Leary, *Toronto*
Ontario Court of Justice (Provincial Division)–The Honourable Mr. Maryka Omatsu, *North York*
Ontario Court of Justice (General Division)–The Honourable Mr. Justice Roger E. Salhany, *Kitchener*
Ontario Court of Justice, (General Division)–The Honourable Mr. Justice J. deP. Wright, *Thunder Bay*
Ontario Court of Justice, (General Division)–The Honourable Mr. Justice T. Zuber, *Windsor*
Ontario Human Rights Commission, *Toronto Central*
Ontario Multifaith Council on Spiritual and Religious Care, *Toronto*
Ontario Public Service Employees Union (OPSEU), *North York*
Ontario Public Service Employees Union - Human Rights Committee - Region 2
Ontario Public Service Network for Racial Minorities
Ottawa Carleton Immigrant Services Organization, *Ottawa*
Ottawa Police
Peabody, Al, *Toronto*
Perera, Ranjit, *Orleans*
Piccinin, Nilo A., *Willowdale*
Police Association of Ontario, *Mississauga*
Police Complaints Commissioner, *Toronto*
Prison Violence Project, *Kingston*
Probation Officers Association of Ontario, Policy & Planning, *Scarborough*
Queen Street Mental Health Centre, Pastoral Services, *Toronto*
Quinte United Immigrant Services, *Belleville*
Race Relations Committee, *Kitchener-Waterloo*
Regional Multicultural Youth Council, *Thunder Bay*
Regional Multifaith Committee on Chaplaincy Windsor-Woodstock Region
Regional Municipality of Ottawa-Carleton
Réseau des Femmes du Sud de l'Ontario, *Hastings*
Rodd, Jane, *Guelph*
Sabsay, Lorne–Barrister and Solicitor, *Toronto*
Samuels, Althea, *Ottawa*
Schrama, Peter, *Toronto*
Shearing, Clifford
Singh, Gurnam, *Guelph*
Skorpid, Doris, *Hamilton*
Spiritual Assembly of the Baha'is of Hamilton
Stacey, M. Lorraine, *Chatham*
Students of Law for the Advancement of Minorities, Faculty of Law, University of Toronto
Sudbury Multicultural Association
Sudbury Race Relations Committee
Sudbury Regional Police Service
Suriya, Senaka K., *Ottawa*
Tanovich, David M., *Toronto*
Tye, Robert, *Etobicoke*
Ukrainian Canadian Civil Liberties Association, *Toronto*
Urban Alliance on Race Relations, *Toronto*
USWA-Local 1405, District 6, *Windsor*
Valentine, Robert, *Oakville*
Van Egmond, John
Verbrugge, Marcus, *Hamilton*
Vietnamese Association, *Toronto*
Walters, Ewart, *Ottawa*
Warmington, Cleveland, *Toronto*
Waterloo Regional Police Services Board, *Kitchener, Cambridge, Waterloo*
Whittingham, Jane, *St. Catherines*
Whyy Mee Family Counselling Foundation of Metropolitan Toronto
Williams, Jasmine, *Ottawa*
Willing, Stephen H., *Windsor*
Woolner, Susan J.–Barrister and Solicitor, *Toronto*
Working Group on Criminal Justice and Mental Health, *Toronto*
Xavier, Pat, *Toronto*
Yachetti, Roger D.,–Yachetti, Lanza & Restivo, *Hamilton*